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PREFACE TO THE THIRD EDITION.

IN this edition the practice in Chancery actions, as altered by the Rules of the Supreme Court of 1883, is stated as concisely as possible, and all the cases still relevant, reported up to October, are collected. Substantial alterations of the practice and new rules are indicated by short foot-notes, but criticism of the rules has been advisedly omitted.

Valuable assistance has been rendered by Mr. Nelson, of the Chancery bar, in reading the proofs, which is thankfully acknowledged.

October, 1883.

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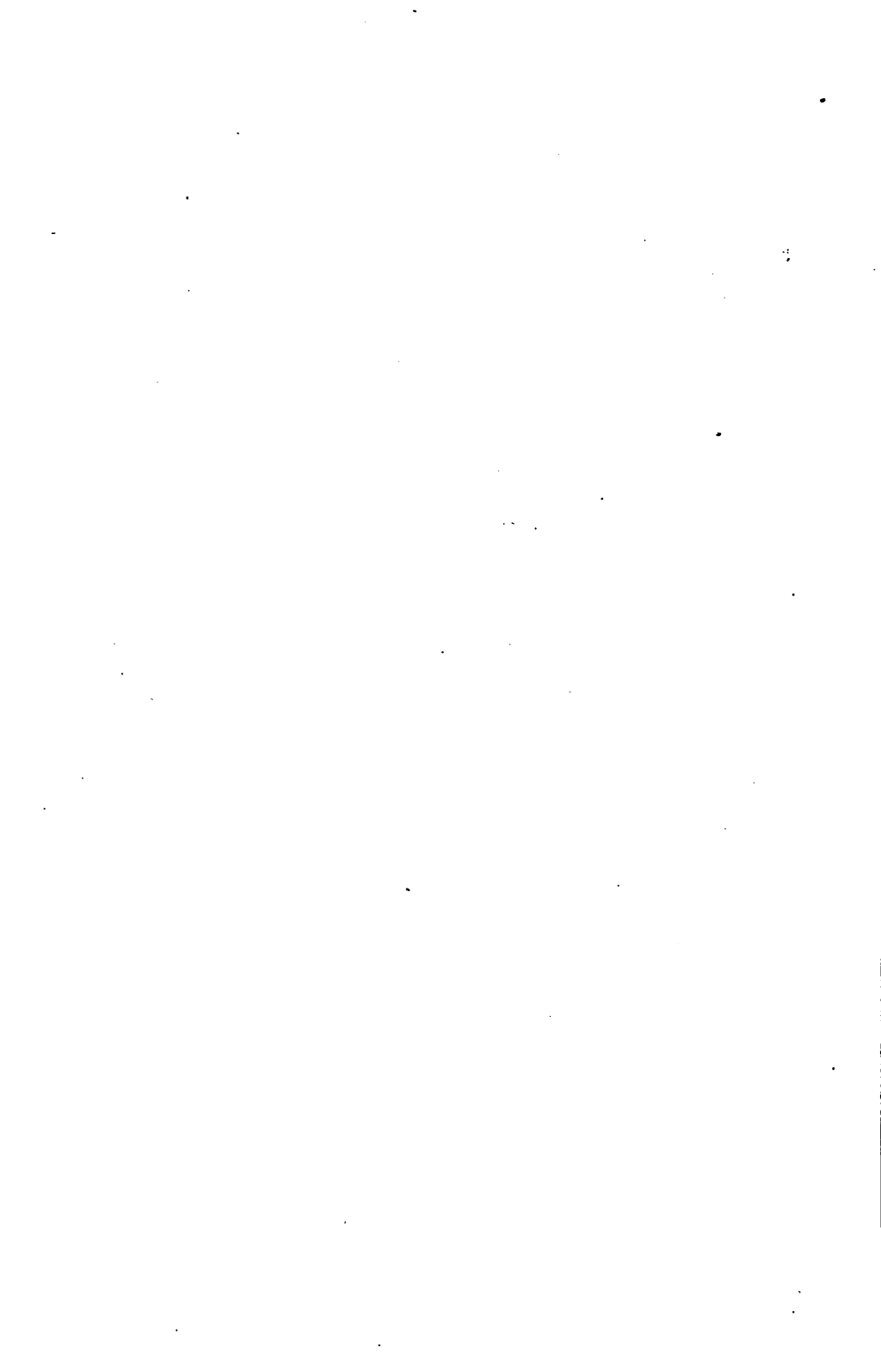
Valuable assistance has been rendered by Mr. Nelson, of the Chancery bar, in reading the proofs, which is thankfully acknowledged.

October, 1883.

PREFACE TO THE SECOND EDITION.

OBJECTION was taken to the first edition of this work that its utility, especially to students, was marred by the absence of any, but incidental, reference to the practice in Judges' Chambers. It is felt that this objection was not ill-founded, and, to meet it, there have been added, in the present edition, a few supplemental chapters dealing shortly with Applications in Chambers, Proceedings in Chambers under Judgment, and Further Consideration, and, to increase facility of reference, a table of orders is also added.

April, 1881.



PREFACE TO THE FIRST EDITION.

NOTWITHSTANDING the various able works, published during the last few years, which treat of the Judicature Acts and Orders, it is thought that there is still room for a work of lesser dimensions confined exclusively to the practice relating to Chancery actions, and that, consequently, the present work may not be altogether without value, either to students or to those in actual practice.

It has not been thought necessary to adhere in any way to the order in which each step or proceeding is dealt with by the Judicature Orders, but endeavours have been made to take each step, so far as possible, in the order in which it actually occurs in the action, by which method it is thought that a readier insight may be afforded to the student of the working of the present practice, while it is hoped that the value of the work to the profession (should it be found fortunate enough to possess any) as a book of reference, may be thus rather increased than impaired.

No pains have been spared in collecting the cases, and it is believed that no reported case, decided since the Judicature Acts came into operation, which has any direct bearing on the present practice relating to Chancery actions, has been omitted. It has not, however, been thought necessary to cite any case decided before that

period, but, wherever the former practice and earlier cases are still material, reference is given to one or other of the leading text books.

In citing cases reported in the Law Reports, reference to those reports alone is given in the foot-notes ; while, in citing cases not reported in the Law Reports, reference is given to the Weekly Notes, where the case is reported there, and to one or two other, but not necessarily to all the other, reports. In the table of cases, however, the plan of Mr. Wilson's last edition has been adopted, and there reference will be found to every report of each case. In the text reference will be found to all cases decided up to Easter in the present year, while in the table of cases reference to the May numbers of the Law Reports and Law Journal will be found.

The forms in the Appendix are, with three exceptions—viz., Nos. 17, 18, and 33—taken from the schedule to the Judicature Act of 1875 ; of the three new forms, No. 33 was recently prescribed by a registrar's notice, while Nos. 17 and 18, which are original, are substituted for Nos. 10, 14, and 24 of Appendix C to the schedule of the Act, on account of the extensive length of No. 14, and of the probable insufficiency, in accordance with recent decisions, of Nos. 10 and 24.

In conclusion, the very great assistance derived from Mr. Wilson's work in compiling the table of cases given in the present work is thankfully acknowledged.

May, 1878.

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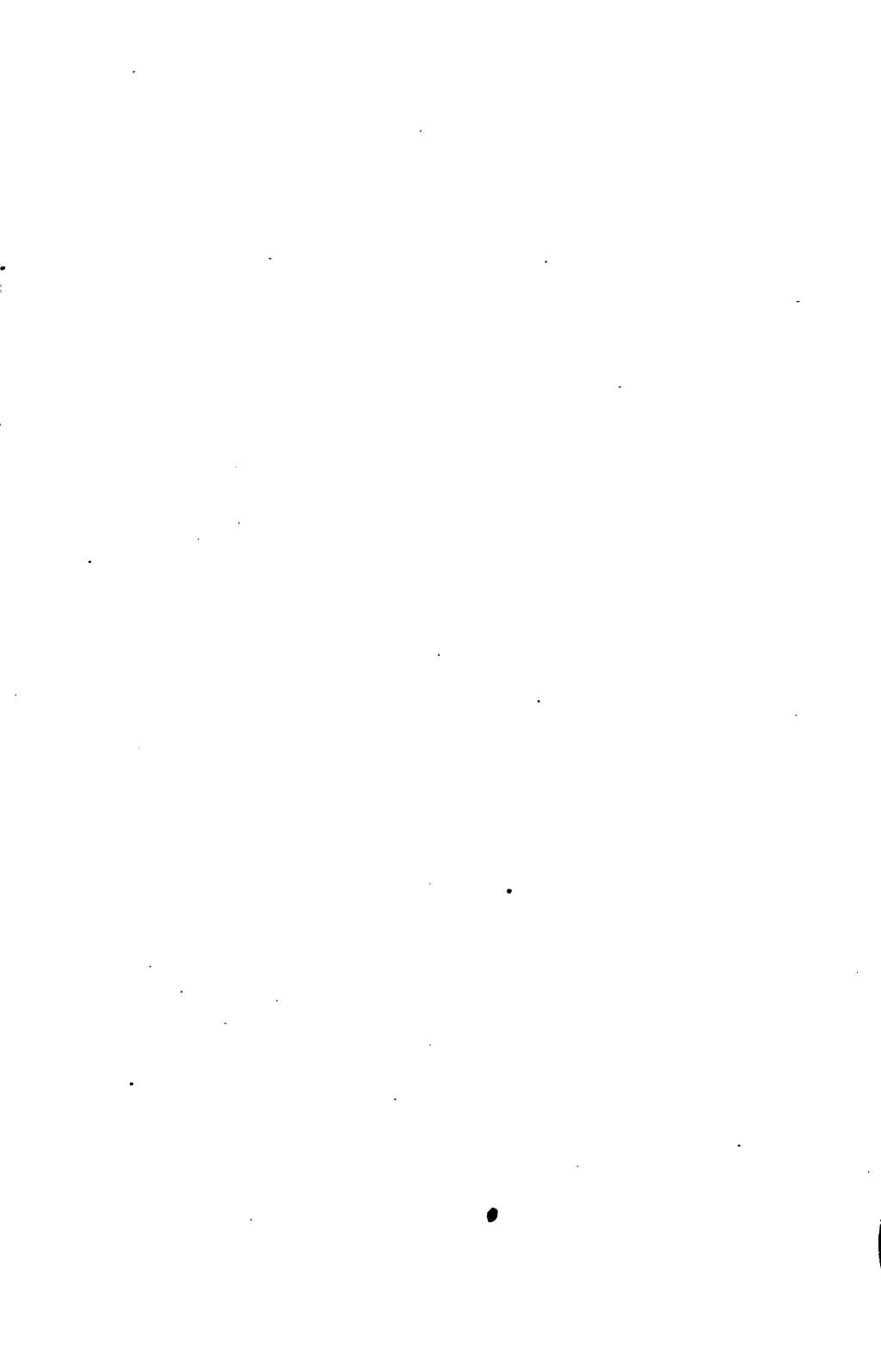
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ERRATA ET ADDENDA.

- Page 12, n. (t), after "*Cresswell v. Parker*," for "*supra*," read "11 Ch. D. 601."
- „ 40, for "Order 19, r. 26," in second marginal note, read "Order 19, r. 25."
- „ 46, for "Order 21," wherever it occurs in marginal notes, read "Order 20."
- „ 54, n. (t), *Fraser v. Cooper, Hall & Co.* is reported 23 Ch. D. 683.
- „ 93, n. (g), after "*Lyell v. Kennedy*," for "50 L. J. Ch. 385," read "52 L. J. Ch. 385."
- „ 100, 101, 102, for "Order 29," wherever it occurs in marginal notes, read "Order 27."
- „ 104, n. (o), *Mersey Steamship Co. v. Shuttleworth* is reported on appeal in 11 Q. B. D. 531.
- „ 109, n. (d), *Gilbert v. Comedy Opera Co.* is reported 16 Ch. D. 594.
- „ 116, n. (d), after "*Powell v. Williams*," for "*supra*," read "12 Ch. D. 234."
- „ 122, n. (g), for "*Muston v. Tobin*," read "*Ruston v. Tobin*."
- „ 128, for "Order 35," in third marginal note, read "Order 36."
- „ 135, for "Order 41a," in second marginal note, read "Order 28, r. 11."
- „ 138, for "Order 52, rr. 3, 6," in third marginal note, read "Order 50, rr. 3, 6."
- „ 156, n. (d), after "*Dicks v. Yates*," read "18 Ch. D. 76."
- „ 172, n. (o), for "6 Ch. D. 193," read "6 Ch. D. 734."
- „ 186, for "Order 43, r. 34," in third marginal note, read "Order 45, r. 9."
- „ 194, for "Order 54, r. 24," read "Order 54, r. 10."

A CONCISE TREATISE
ON THE
PRACTICE AND PROCEDURE
IN
CHANCERY ACTIONS.

CHAPTER I.

ISSUE OF WRIT.

EVERY action must be commenced by the issue of a writ of summons (a). Order 2, r. 1.
Action to be
begun by writ.

The writ must be endorsed with a brief statement of the nature of the plaintiff's claim (b), and must specify the division of the Court to which the action is to be assigned (c), and must be dated the day of issue, and tested in the name of the Lord Chancellor, or, if that office is vacant, in the name of the Lord Chief Justice of England. Order 2, rr. 1,
8. Form of
writ.

The endorsement of claim, which must be made before the writ is issued, need not give the precise grounds of the plaintiff's claim, or the precise relief which he desires. Order 3, rr. 1,
2. Endorse-
ment of writ.

- (a) For form of writ, see App. No. 1. see App. Nos. 2—10.
(b) For forms of endorsement, (c) The plaintiff is deprived of the power of choosing his judge.

Order 2, r. 4.
Service out of
jurisdiction.

A writ for service out of the jurisdiction, or of which notice in lieu of service is to be given out of the jurisdiction (*d*), can only be issued by leave of the Court or Judge. The application for leave is sufficiently supported by a verbal statement of the nature of the action (*e*). Where persons living out of the jurisdiction are added as defendants by amendment, an order to amend the endorsement of the original writ must be obtained, and it will then become a writ issued by leave (*f*).

Order 3, r. 4.
Representative
capacity

Where the plaintiff sues, or the defendant is sued, in a representative character, the endorsement of the writ must show the character in which he sues or is sued (*g*), and if he sue or is sued both in a representative and in a personal character, both must appear in the endorsement (*h*).

Order 3, r. 8.
Claim for
account.

Whenever the plaintiff desires an account to be taken in the first instance the writ must be endorsed with a claim for such account (*i*), and he can then apply by summons for an order for the proper account, with all necessary inquiries and directions (*j*).

Order 5, r. 1.
Issue of writ
out of registry.

The plaintiff, wherever resident, may issue a writ out of any District Registry.

Order 5, r. 2.
Issue out of
Central Office.

Every writ not issued out of a District Registry shall be issued out of the Central Office.

Order 4, rr. 1,

The writ, or notice of the writ in lieu of service, must

(*d*) For forms of writ and notice, see App. Nos. 11 & 12.

(*e*) *Stigand v. Stigand*, 19 Ch. D. 460.

(*f*) *Keate v. Phillips*, W. N. 78, p. 186.

(*g*) For form, see App. No. 3.

(*h*) *Johnson v. Burges*, 47 L. J. Ch. 552.

(*i*) The old rule was confined to cases of "ordinary account."

(*j*) *Post*, p. 21.

be endorsed with the address of the plaintiff, and also with the name or firm and place of business of his solicitor, where he does not sue in person, and where such solicitor is only an agent, with the name or firm and place of business of the principal solicitor. If the place of business of the solicitor, or the address of the plaintiff, where he sues in person, be more than three miles from the Royal Courts of Justice, in case of writs issued out of the Central Office, or outside the district, in case of writs issued out of a District Registry, the writ must also be endorsed with an address for service within three miles of the Royal Courts of Justice, or within the district, and all documents, proceedings, and written communications in the action must be left there. Where in the case of a writ issued out of a District Registry the defendant resides outside the district, the writ must be endorsed with a further address for service within three miles of the Royal Courts of Justice.

Where the writ contains no address for service, as above required, all notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications, may be served by filing them in the Central Office, or in the District Registry, unless personal service is requisite (*k*).

A writ issued out of a District Registry must, if the defendant neither resides nor carries on business within the district, state that he may appear either in the District Registry or at the Central Office; but if the defendant resides, or carries on business, within the

2, 3. Writ to be endorsed with address.

Order 67, r. 4. Omission of address for service.

Order 5, rr. 3, 4. Writ issued out of District Registry to name place for appearance.

(*k*) This rule is new.

district, it must state that he must appear in the District Registry.

Order 5, rr. 10,
11. Writ to
be prepared
by plaintiff,
and sealed.

The writ must be prepared by the plaintiff or his solicitor, and may be written or printed, or partly written and partly printed; when prepared, it must be sealed by one of the Clerks of the Writ Appearance and Judgment Department of the Central Office, or by the District Registrar, and will then be deemed to be issued. When the writ is presented for sealing, a copy signed by the plaintiff or his solicitor must be left with the Clerk of the above department of the Central Office, or District Registrar, which will be filed by him, and an entry of filing made in the cause book, the action being distinguished by the date of the year, a letter and number, and also, if the writ is issued out of a District Registry, with the name of the particular Registry.

rr. 12, 13, 14.
Copy of writ
to be filed.

Order 5, r. 9.
Marking with
name of
Judge.

The officer issuing the writ must mark it with the name of a Judge of the Chancery Division, to whom chambers are attached, to be ascertained in the same way as in distributing business among conveyancing counsel of the Court (*k*).

Order 6, rr. 1,
2. Issue of
concurrent
writs.

The plaintiff may, while the original writ continues in force, issue one or more concurrent writs, bearing the same date as the original writ, and sealed by one of the Clerks of the Writ Appearance and Judgment Department of the Central Office, or by the District Registrar, with the word "concurrent," and the date of issuing

(*k*) This rule is new; hitherto his Judge.
the plaintiff has been able to choose

the concurrent writ. The concurrent writ will only remain in force while the original writ does. A writ for service out of the jurisdiction, or of which notice out of the jurisdiction is intended to be given in lieu of service, may be issued concurrently with one for service within the jurisdiction (*l*), and a writ for service within the jurisdiction may be issued concurrently with one for service or notice out of the jurisdiction (*m*).

The original writ only remains in force twelve months from issue, but if the plaintiff has been unable to serve any defendant, he may, before the end of the twelve months, on application to the Court or a judge (*n*) obtain leave to renew the writ for six months, if he can show that reasonable efforts to effect service have been made; and leave for further renewals may be obtained from time to time during the currency of a renewed writ (*o*). Where no question arises on the statute of limitations, leave to renew the writ may be given after the writ has expired (*p*), but not otherwise (*q*). Where the writ has been lost, leave to renew cannot be granted (*r*).

Order 8, r. 1.
Writ remains
in force twelve
months.

Leave to re-
new after
expiration of
writ.

Where the writ has been lost, the Court or Judge, if satisfied of the loss and of the correctness of the copy,

Order 8, r. 3.
Copy of lost
writ.

(*l*) Leave to issue a concurrent writ for service or notice out of the jurisdiction is necessary, *ante*, p. 2.

(*m*) Where several defendants reside in different places, and immediate service of the writ is advisable, time may be saved by the issue of concurrent writs.

(*n*) Under the old rule the application for renewal was to "the

Judge or District Registrar."

(*o*) The usual course, where service cannot be effected, is to obtain an order for substituted service.

(*p*) *Eyre v. Cox*, W. N. 77, p. 38; 46 L. J. Ch. 316.

(*q*) *Doyle v. Kaufman*, 3 Q. B. D. 7, 340.

(*r*) *Davies v. Garland*, 1 Q. B. D. 250.

may order a copy to be sealed and served in lieu of the original writ.

Order 8, r. 1.
Renewal
effected by
sealing.

Renewal of the writ is effected by its being sealed by one of the Clerks of the Writ Appearance and Judgment Department of the Central Office, or by the District Registrar, with the date of renewal, on production of a memorandum requiring him to do so (s). When renewed the writ will operate in bar of the statute of limitations, and be available for all other purposes from the date of issue of the original writ; the fact of renewal and the date of the commencement of the action being sufficiently evidenced by its being properly sealed.

r. 2. Evidence
of renewal.

(s) For form of memorandum, see App. No. 13.

CHAPTER II.

SERVICE OF WRIT.

IF the defendant, by his solicitor, undertakes in writing (a) to accept service and enters an appearance, service of the writ will be unnecessary, otherwise the writ must, where practicable, be served personally on each defendant.

If the plaintiff is unable, from any cause, promptly to effect personal service of the writ on any defendant, he may, on application to the Court or Judge, obtain an order for substituted service, by letter, public advertisement, or otherwise, the application being supported by an affidavit showing the grounds on which it is made. Leave has been granted to effect substituted service by leaving copies of the writ at the place of business and private address of the defendant, and sending a copy by post to him at each address (b), or by leaving copies of the writ at his office and at his lodgings (c), or with his wife (d), or relations (e), or with his former solicitors,

(a) The old rule did not require any writing.

(b) *Capes v. Brewer*, W. N. 75, p. 193; 24 W. R. 40.

(c) *Cook v. Dey*, 2 Ch. D. 219; *Crane v. Jullion*, 2 Ch. D. 220; *Hamilton v. Davies*, W. N. 80; p. 82.

(d) *Bank of Whitehaven v. Thompson*, W. N. 77, p. 45. *Mulhous v. Bannister*, W. N. 82, p. 183.

(e) *Wolverhampton and Staffordshire Banking Co. v. Bond*, W. N. 81, p. 6.

Order 9, r. 1,
2. Personal service.

Order 9, r. 2.
Order 10.
Order 67, r. 6.
Substituted service;

how effected.

and at his last known address (*f*), and advertising in the *Times* and *London Gazette*; but reasonable ground must be shown for supposing that the substituted service will come to the notice of the person to be served (*g*). Persons who from their status cannot be served with a writ, cannot be reached by means of substituted service (*h*). Where recourse is had to advertisement, the time runs from the service of the writ, or the issue of the advertisement, whichever happens last (*i*).

Order 9, r. 3.
Service on
wife.

Where husband and wife are both defendants they must both be served unless otherwise ordered.

Order 9, r. 4.
Service on
infant.

Service on the father or guardian of an infant defendant, or, if there is no father or guardian, on the person under whose care the infant is, or with whom the infant resides, will, unless otherwise ordered, be deemed good service on the infant, and the Court or the Judge in Chambers may order that service on the infant personally be deemed good service.

Order 9, r. 5.
Service on
lunatic or per-
son of unsound
mind.

Where a lunatic, or person of unsound mind, not so found by inquisition, is a defendant, service on the committee of the lunatic, or on the person under whose charge the person of unsound mind is, or with whom the person of unsound mind resides, will, unless otherwise ordered, be deemed good service on such defendant (*k*).

(*f*) *Rafael v. Ongley*, 34 L. T. 124; *Dymond v. Croft*, 24 W. R. 842; but see *Watt v. Barnett*, 3 Q. B. D. 183, 363, as to setting aside judgment on default, where no knowledge of the action has reached the defendant.

(*g*) *Furber v. King*, 29 W. R. 535; *Wolverhampton Banking Co. v. Bond*, W. N. 81, p. 6; 29 W. R.

599.

(*h*) *Sloman v. Governor and Government of New Zealand*, 1 C. P. D. 563; *Stewart v. Bank of England*, W. N. 76, p. 263.

(*i*) *Crane v. Jullion*, 2 Ch. D. 220.

(*k*) *Thorn v. Smith*, W. N. 79, p. 81; s. c. nom. *Than v. Smith*, 27 W. R. 617.

Where partners are sued in the name of their firm, Order 9, r. 6. Service on partners. service on any one of them, or on their manager at their principal place of business, will be deemed good service on the firm; and where one person, carrying on business r. 7. On individual sued as a firm under the name of a firm apparently consisting of more than one person, is sued in the name of the firm, service on the manager at the principal place of business will be deemed good service on the person sued; even though the defendant himself is out of the jurisdiction (*l*); but not where he is a lunatic (*m*).

Where the partnership has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ must be served upon every person whom it is sought to charge (*n*). Order 16, r. 14. Dissolution of partnership.

A writ against a corporation aggregate may be served Order 9, r. 8. Service on corporations. on the mayor or other chief officer, or on the town clerk, treasurer, or secretary; a writ against the inhabitants of a hundred or like district by service on the high constable; and a writ against the inhabitants of any county, town, or place, not forming part of a hundred, on some peace officer. Societies, fellowships, or other bodies of persons, corporate or otherwise, may be served in the manner provided by statute (*o*).

The writ, (whether personal or substituted), (*p*) must, Order 9, r. 15. Writ to be endorsed with date of service. within three days from service, be endorsed with the date of service by the person serving it, or the plaintiff

(*l*) *O'Neil v. Clason*, 46 L. J. Q. B. D. 191.

(*m*) *Fore Street Warehouse Co. v. Durrant & Co.*, 10 Q. B. D. 471.

(*n*) This provision is new.

(*o*) Under sec. 62 of the Companies Act, 1862, a writ against a

company may be served by leaving it at their registered office, or by sending it by post to the company at such office.

(*p*) The old rule did not apply to substituted service.

will not, in case of non-appearance to the writ, be able to proceed by default: the person making the affidavit of service must state, in his affidavit, the day on which the endorsement was made (*q*). The Court has power to extend the time for making the endorsement; but a fresh affidavit of service must be made (*r*).

Order 11, r. 1.
Service out of
the jurisdic-
tion.

Leave to effect service of the writ out of the jurisdiction, or to give notice in lieu of service out of the jurisdiction, may be given by the Court or the Judge whenever—

- (a.) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or
- (b.) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or
- (c.) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or
- (d.) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a

(*q*) As to the form of affidavit of service, see *Bustros v. Bustros*, 14 Ch. D. 849.

(*r*) *Hastings v. Hurley*, 16 Ch. D. 734; *Sproat v. Peckett*, W. N. 83, p. 76; 48 L. T. 755.

trustee, which ought to be executed according to the law of England ; or

- (e.) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland ; or
- (f.) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof ; or
- (g.) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

The application for leave to serve the writ, or notice of the writ, out of the jurisdiction must be supported by an affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing where the defendant is to be found, and whether he is a British subject or not, and showing the grounds on which the application is made. On an application to set aside the order for service out of the jurisdiction, the defendant may file an affidavit rebutting the evidence on which the order was made (s).

Order 11, r. 4.
Application
for leave for
service out of
jurisdiction to
be supported
by affidavit.

* (s) *Fowler v. Barstow*, 20 Ch. D. 240 ; but see *Great Australian Gold Mining Co. v. Martin*, 5 Ch. D. 1.

Order 11, r. 2.
Service in
Scotland or
Ireland.

Where leave is asked to serve a writ in Scotland or Ireland, and it appears that there is a concurrent remedy there, the Court or Judge will have regard to the comparative cost and convenience of proceeding here or in the place of residence of the defendant (*t*).

Order for
service out of
jurisdiction.

Application for an order to serve the writ out of the jurisdiction should be to the Judge personally, and not to his chief clerk (*u*), and may be made simultaneously with the application for leave to issue the writ (*x*). Where the order having been improperly obtained in the first instance is subsequently discharged, the plaintiff must pay to the defendant all costs occasioned by the issue of the writ (*y*). No objection to the propriety of the order giving leave for service out of the jurisdiction can be taken by the defence, but only by appeal from the order (*z*).

Order 11, r. 5.
Time for ap-
pearance.

The order for service, or notice, of the writ out of the jurisdiction will limit a time for the defendant's appearance, in fixing which regard will be had to the place where the defendant is to be served. The order may also provide for the service of interrogatories and of an *ex parte* injunction (*a*).

Order 11, rr. 6,
7. Notice of
writ out of
jurisdiction.

Notice in lieu of service of the writ out of the jurisdiction, (which is the course to be adopted where the defendant is neither a British subject nor in British

(*t*) *Cresswell v. Parker*, *supra*; 460.
Tottenham v. Barry, 12 Ch. D. 805; (*y*) *Tottenham v. Barry*, 12 Ch.
Ex parte McPhail, 12 Ch. D. 632; D. 805.
Wood v. McInnes, 4 C. P. D. 67. (*z*) *Preston v. Lamont*, 1 Ex. D.
(*u*) *Tottenham v. Barry*, 12 361. *WICKHAMPTON v. WICKHAMPTON*
Ch. D. 805. (*a*) *Young v. Brassey*, 1 Ch. D.
(*x*) *Stigand v. Stigand*, 19 Ch. D. 277.

dominions), must be served in the same way as writs are served; notice must be given not only in the case of foreign individuals, but also of foreign corporations (b); but an Englishwoman married to a foreigner may be served with the writ itself (c).

The defendant may, before appearing, move to set aside service on him of the writ, or of notice in lieu of the writ, or discharge the order authorising such service, without entering conditional appearance.

Order 12, r. 30.
Conditional
appearance
unnecessary.

District Registrars have no jurisdiction to grant leave for service or notice of a writ out of the jurisdiction.

Order 35, r. 6.
Order 54, r. 12.
District
Registrar.

Any defendant served with a writ endorsed with the name of a solicitor, may demand in writing from the solicitor, whether the writ was issued with his authority, and if he replies in the negative all proceedings will be stayed, and no further proceedings can be taken on the writ without leave.

Order 7, r. 1.
Authority of
solicitor.

Any defendant served with a writ in which partners, suing in the name of their firm, are plaintiffs, may demand, in writing, from the plaintiffs, or their solicitor, the names and addresses of the persons constituting the firm; and, if the demand is not complied with, he may obtain an order staying all proceedings in the action. When the names of the persons constituting the firm have been declared, the action will proceed in the same manner, and with the same consequences, as if they had been named as plaintiffs; but all proceed-

Order 7, r. 2.
Disclosure of
names of
partners on
written
demand.

(b) *Scott v. Wax Candle Co.*, 1 Q. B. D. 404; *Westman v. Aktiebolaget, &c.*, 1 Ex. D. 237.

(c) *Bacon v. Turner*, 34 L. T. 647.

ings must, nevertheless, be continued in the name of the firm.

Order 16, r. 14.
Disclosures of
names of part-
ners on
summons.

Either plaintiff or defendant may, where any other parties to the action are partners suing or being sued in the name of their firm, obtain, on application by summons, an order for a statement of the names of the partners, to be given and verified in such manner as the Judge may direct.

CHAPTER III.

APPEARANCE.

EXCEPT where the writ is issued out of a District Registry, the defendant must appear in the Central Office. Order 12, rr. 1, 2. In London.

Where the writ is issued out of a District Registry, any defendant residing or carrying on business within the district must appear in the District Registry; while any defendant, not residing or carrying on business within the district, may either appear in the District Registry or in the Central Office. Order 12, rr. 4, 5. In District Registry.

Appearance must be effected by delivering a memorandum in writing to one of the Clerks of the Writ Appearance and Judgment Department of the Central Office, or to the District Registrar, dated the day of delivery, and containing the name and place of business of the defendant's solicitor, or stating that the defendant defends in person, and in that case containing the defendant's address (a). The defendant's solicitor, or the defendant himself, if suing in person, must give, in the memorandum of appearance, an address for service within three miles of the Royal Courts of Order 12, rr. 8, 10, 11. Appearance to be effected by delivery of memorandum at Central Office. Defendant's address for service.

(a) For form of memorandum of appearance, see App. No. 14.

- Justice, where the defendant appears in the Central Office, or, where he appears in a District Registry, an address for service within the district, or the memorandum of appearance will not be received. In the event of a fictitious address for service being given, the plaintiff may apply to the Court or the Judge in Chambers to have the appearance set aside. The memorandum of appearance will, when received by the Clerk or District Registrar, be entered by him in the cause book.
- Order 12, r. 12. Fictitious address.
- r. 14. Entry in cause book.
- Order 67, r. 4. Default of address for service.
- Order 16, r. 18. Appearance infants.
- Order 12, r. 8. Duplicate of memorandum to be sealed.
- At the time of entering appearance a duplicate of the memorandum must also be delivered to the Clerk of the Writ Appearance and Judgment Department of the Central Office, or District Registrar, which will be sealed by him with the official seal, showing the date

(b) This rule is new ; as Order 12, r. 12, provides that the memorandum will not be received without an address, it is not easy to see how the plaintiff is to benefit by it.

of sealing, and returned to the party entering the appearance, and will then be a certificate of the date of appearance.

On the day on which the defendant enters appearance he must give notice of his appearance to the plaintiff's solicitor, or to the plaintiff himself, if he sues in person, either by notice in writing served at the plaintiff's address for service, or by letter posted to that address, and in either case the notice must be accompanied by the sealed duplicate memorandum. The omission by the defendant of due notice of appearance will enable the plaintiff to proceed as in default of appearance (c). Order 12, r. 9.
Notice of appearance.

If the defendant requires the delivery of a statement of claim, he must, at the time of his appearance, or within eight days afterwards, give notice in writing to that effect to the plaintiff or his solicitor (d). Order 20, r. 1.
Notice to deliver statement of claim.

Where several defendants appear simultaneously by the same solicitor, their names must all be contained in the same memorandum of appearance. Order 12, r. 17
Several defendants.

Partners sued in the name of their firm must appear individually in their own names; and any one person carrying on business in the name of a firm, apparently consisting of more than one person, must appear in his own name; but, in either case, all subsequent proceedings will continue in the name of the firm. Where one only of two partners sued in the name of Order 12, rr. 15, 16. Partners.

(c) *Smith v. Dobbin*, 3 Ex. D. 338; but see and consider *Johnson v. Whitehead*, W. N. 76, p. 10.

(d) Under the old rules the

plaintiff had to deliver a statement of claim unless the defendant at the time of appearance stated he did not require it.

the firm has appeared, he may put in a defence in the firm's name so as to prevent judgment going by default (e).

Order 12, r. 18. A solicitor undertaking to enter appearance for any defendant, and failing to do so, becomes liable to attachment.
Solicitor failing to enter appearance.

Order 12, r. 22. A defendant may appear at any time before judgment; if he does so, however, after the eight days limited by the writ for appearance, he will not, unless otherwise ordered, have further time for delivering his defence, or for any other purpose, than if he had appeared within the proper time.
Right of defendant to appear at any time before judgment.

Order 12, r. 4. Where the writ is issued out of a District Registry, and all the defendants who enter an appearance appear there, the action will, unless any defendant requires its removal to London, proceed in the District Registry; but in all other cases actions will proceed in London, unless otherwise ordered (f).
Action to proceed in Registry if defendants all appear there.

Order 12, r. 30. The defendant need not enter a conditional appearance to enable him to set aside the service on him of the writ, or notice of the writ, or to discharge the order authorising such service.
Conditional appearance abolished.

(e) *Taylor v. Collier*, 51 L. J. Ch. 853.

(f) As to the right of a defendant to require removal of an action from a District Registry to London, and the power of the

Court or the Judge in Chambers to control this right, and also to order actions to proceed in the Registry, notwithstanding the appearance of the defendant in London, see *post*, Chap. 41.

CHAPTER IV.

PROCEEDINGS IN DEFAULT OF APPEARANCE.

WHERE no appearance to the writ has been entered within the time limited for so doing, for a defendant who is an infant, or a person of unsound mind not so found by inquisition, the plaintiff, before proceeding further with the action against such defendant, must (g) apply to the Court or Judge for an order appointing a guardian *ad litem*, by whom such defendant may appear and defend the action.

Order 13, r. 1.
Appointment
of guardian
ad litem.

Six clear days' notice of the application for the appointment of a guardian *ad litem* must be served or left at the house of the person with whom, or under whose charge, the defendant was at the time the writ was served; and must also, if the defendant is an infant not residing with his father or guardian, be served on, or left at the house of, the father or guardian, if any, unless notice to them is dispensed with on the hearing of the application; but notice cannot be given till

Order 13, r. 1.
Notice of ap-
plication for
appointment.

(g) The old rule was permissive only, and it was held unnecessary to obtain an order for the appointment of a guardian *ad litem* unless

relief was asked against the defendant. *Taylor v. Pede*, W. N. 61, p. 74; 29 W. R. 627.

the time for the defendant's appearance has expired. The application must be supported by evidence of due notice having been given, and also of the writ having been served.

Order 13, rr. 2,
12. Proceedings on default of appearance.
Order 19, r. 10.
Order 67, r. 4.
Pleadings delivered by filing.

Where any defendant, (other than an infant or person of unsound mind), fails to appear within the time limited, the plaintiff may, on filing an affidavit of service and statement of claim (*h*), proceed as if the defendant had appeared; and in such case he may deliver all subsequent pleadings and other documents in the action by filing them in the Central Office, or in the District Registry in which the action is proceeding (*i*).

(*h*) It will be observed that to enable the plaintiff to proceed so on default of appearance it is still necessary to deliver a statement of claim.

(*i*) This mode of proceeding on default of appearance applies to

actions of the nature specially assigned by the Judicature Acts to the Chancery Division, *post*, p. 23, and to all other actions except actions for debt, liquidated demand, detention of goods, damages or recovery of land.

CHAPTER V.

PROCEEDINGS ON WRIT ENDORSED WITH CLAIM FOR
ACCOUNT.

IN actions for account, the plaintiff may, if the writ is endorsed with a claim for account, or a claim which involves taking an account, obtain an order for the proper accounts, with all necessary and usual inquiries and directions, on summons, unless the defendant, having duly appeared to the writ, can satisfy the Judge, by affidavit or otherwise, that there is some preliminary question to be tried (*a*). A complete foreclosure decree cannot be obtained under this rule (*b*). The words, "the Judge not requiring any further trial," &c., should not be inserted as a matter of course in orders under this rule (*c*). The fact that an order has been made under this rule does not, it would seem, preclude the subsequent delivery of a statement of claim (*d*), but it is not necessary to deliver one merely to make a case for costs, as any matter required on further considera-

Order 15, r. 1.
Order on
summons.

(*a*) It will be observed that the rule is no longer confined to cases of ordinary account, but is in general terms.

(*b*) *Lloyd v. David Lloyd & Co.*, 26 W. R. 572.

(*c*) *Gatti v. Webster*, 12 Ch. D. 771.

(*d*) *Jones v. Chennell*, 8 Ch. D. 498; *Gatti v. Webster*, 12 Ch. D. 771.

tion as to costs may be proved by affidavit in any case (e). The order may be made by a District Registrar (f).

Order 15, r. 2.
Application to
be supported
by affidavit.

The application, which may be made at any time after the time limited for the defendant's appearance has expired, must be supported by an affidavit, stating concisely the grounds of the plaintiff's claim to an account.

(e) *Beane v. Elliott*, W. N. 80,
p. 99.

(f) *Bennett v. Bowen*, 20 Ch. D.
538.

CHAPTER VI.

ACTIONS ASSIGNABLE TO CHANCERY DIVISION.

THE plaintiff may assign his action, whatever its nature, to any division he pleases; but it can with propriety be assigned only to the Chancery Division, if wholly, or in part, for any of the following objects, viz.:—

- “The administration of the estates of deceased persons. Judicature Act, 1875, s. 11. Plaintiff free to choose his division.
- “The dissolution of partnerships, or the taking of partnership or other accounts. Judicature Act, 1873, s. 34. Actions properly assignable to Chancery Division.
- “The redemption, or foreclosure, of mortgages.
- “The raising of portions or other charges on land.
- “The sale and distribution of the proceeds of property, subject to any lien or charge.
- “The execution of trusts, charitable or private.
- “The rectification, or setting aside, or cancellation, of deeds or other written instruments.
- “The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases.
- “The partition or sale of real estates.
- “The wardship of infants, and the care of infants’ estates.”

Judicature
Act, 1875, s.
11, sub-s. 2.
Action
assigned to
wrong divi-
sion may be
transferred.

And if, in such a case, any other division is chosen, the defendant may obtain an order at any stage of the proceedings for a transfer of the action to the Chancery Division. If, on the other hand, the action be one formerly within the exclusive cognizance of any of the Common Law Courts, or be of a nature more fitly to be dealt with by any of the Common Law Divisions, the plaintiff cannot with propriety assign his action to the Chancery Division, as the defendant may, if he does so, obtain an order for its transfer to the proper division (a).

Effect of
equitable
counterclaim

If the defendant to an action rightly assigned to one of the Common Law Divisions delivers a counterclaim for any of the objects specified above, as for specific performance (b), it has been held by the Court of Appeal that he thereupon becomes entitled to an order for a transfer of the action to the Chancery Division (c).

(a) *Humphreys v. Edwards*, W. N. 75, p. 208; 45 L. J. Ch. 112; *Pinney v. Hunt*, 6 Ch. D. 98.

(b) *Holloway v. York*, 2 Ex. D. 333; *Hillman v. Mayhew*, 1 Ex. D. 132; *Smyth v. Levinge*, 39 L. T. 579; but see *contra*, *Storey v.*

Waddle, 4 Q. B. D. 289, where the Court of Appeal, differently constituted, in an exactly similar case to *Holloway v. York*, declined to make the order.

(c) As to transfer of actions, see *post*, Chap. 39.

CHAPTER VII.

JOINDER OF DIFFERENT CAUSES OF ACTION.

THE plaintiff may unite in the same action several causes of action; if, however, it appears that any of such causes of action cannot be conveniently tried with the rest, the Court, or the Judge, may, on the application of the defendant, order them to be tried separately, or otherwise provide for their separate disposal, or may order any of such causes of action to be excluded and such consequential amendments to be made, and make such order as to costs, as is just. A claim to set aside an agreement for partnership may be properly joined with a claim, in the alternative, for the usual partnership decree (a). To warrant joinder of several causes of action there must be identity of parties (b).

If the plaintiff desires to join any other cause of action with an action for the recovery of land, except claims for mesne profits, or arrears of rent, or double value, in respect of the premises claimed, or damages for breach of any contract under which the land is held, or for

Order 18, r. 1.
Plaintiff may join several causes of action.
rr. 8, 9. Separate trials.

Order 18, r. 2.
Joinder with action for recovery of land.

(a) *Bagot v. Easton*, 7 Ch. D. 1; but see *Evans v. Davies*, W. N. 78, p. 222. (b) *Smith v. Richardson*, 4 C. P. D. 112; and see *Att.-Gen. v. Lord Durham*, 46 L. T. 16.

any wrong or injury to the premises claimed, he must, before issuing the writ, apply to the Court, or Judge, for leave to do so, and if he fails to do so, the Court cannot afterwards rectify the error (*c*). Leave will be granted to join with an action for the recovery of land, a claim for the appointment of a receiver and an injunction (*d*), an injunction to restrain continuing trespass (*e*), or a claim for the recovery of the deed under which the land is held (*f*), or a claim for the recovery of personal estate, held under the same instrument as the land (*g*). An action to establish a title to land, without a claim for possession, is not an action for the recovery of land, so as to render the leave of the Court necessary before joining with it any other cause of action (*h*), nor is an action for foreclosure (*i*). The rule applies to a counterclaiming defendant (*k*). Unless a very special case is made, leave will not be given to amend, after issue of the writ, by adding a claim for recovery of land (*l*).

Order 20, r. 7.
Statement of
causes of
action.

Where the plaintiff or a counterclaiming defendant joins several causes of action in the same action, he

(*c*) *Pilcher v. Hinds*, 11 Ch. D. 905; *Brandreth v. Shears*, W. N. 83, p. 89.

(*d*) *Cook v. Enchmarch*, 2 Ch. D. 111; *Allen v. Kennett*, 24 W. R. 845; *Kendrick v. Roberts*, 30 W. R. 365.

(*e*) *Dennis v. Crompton*, W. N. 82, p. 121.

(*f*) *Cook v. Enchmarch*, 2 Ch. D. 111.

(*g*) *Kitching v. Kitching*, W. N. 76, p. 225; 24 W. R. 901; *Cook v. Enchmarch*, 2 Ch. D. 111;

Whetstone v. Dewis, 1 Ch. D. 99.

(*h*) *Gledhill v. Hunter*, 14 Ch. D. 492, where Jessell, M.R., discussed at length the object of the rule, and declined to follow the decision of V.-C. Hall in *Whetstone v. Dewis*, 1 Ch. D. 99.

(*i*) *Tawell v. Slate Co.*, 3 Ch. D. 629.

(*k*) *Compton v. Preston*, 21 Ch. D. 138.

(*l*) *Musgrave v. Stephens*, W. N. 81, p. 163.

must, as far as possible, state them separately and distinctly in his statement of claim or counterclaim.

Except by leave of the Court, or Judge, a claim by a trustee in bankruptcy, as such, cannot be joined with a claim by him in any other capacity. Order 18, r. 3.
Claim by trustee in bankruptcy.

Claims by or against a husband and wife jointly, may be joined with claims by or against them separately; and claims by or against executors or administrators in their representative character, with claims by or against them in their personal character, provided both claims have reference to the estate which they represent (*m*); and claims by co-plaintiffs jointly may be joined with claims by them separately against the same defendant. Order 18, r. 4.
Husband and wife;
r. 5, executors;
r. 6, joint and separate claims.

The Court, or the Judge in Chambers, may, if it appears that the several causes of action cannot be conveniently disposed of together, order them to be tried separately, or otherwise separately disposed of, or may order any of such causes of action to be excluded, and any consequential amendments to be made, and make such order as to costs as seems just. Where the plaintiff sues only in his personal character and the defendant counterclaims against him as well in a representative as in his personal capacity, such parts of the counterclaim as claim against him in his representative capacity will be struck out (*n*). Order 18, rr. 7, 8, 9. Separate trials or exclusion by amendment.

(*m*) See *Padwick v. Scott*, 2 Ch. D. 736, 743; *Johnson v. Burgess*, 47 L. J. Ch. 552; and *McDonald v. Carington*, 4 C. P. D. 28,

where the object of this rule is explained.

(*n*) *McDonald v. Carington*, 4 C. P. D. 28.

CHAPTER VIII.

PARTIES TO AN ACTION.

Order 16, r. 1.
Who may be
co-plaintiffs.

ALL persons in whom the right to relief, either jointly, severally, or in the alternative, is alleged to exist, may be joined as co-plaintiffs, and judgment may be given for such of them as are found entitled to relief, without any amendment being necessary; but the defendant, even though unsuccessful, will be entitled to his costs occasioned by the joinder of any persons who are not found to be entitled to any relief. To enable joinder of plaintiffs, there must, it would seem, be identity of causes of action (a), and two causes of action by different plaintiffs cannot be joined which are antagonistic, the one depending on the failure of the other (b).

Costs of mis-
joinder.

Order 16, rr.
4, 7. Relief
may be claimed
jointly, sever-
ally, or in the
alternative.

The plaintiff may join, as defendants, all persons against whom he claims relief, whether he claims it against them jointly or severally, or, being doubtful from whom he is entitled to relief, claims it against them in the alternative: thus, in a case of disputed agency, he may make both principal and agent defend-

Alternative
claims.

(a) *Smith v. Richardson*, 4 C. P. D. 112.

(b) *Attorney-General v. Lord Durham*, 46 L. T. 16.

ants to an action for specific performance, and ask relief against the agent personally, in case the agency is not established (c); or, where a trespasser on the plaintiff's premises alleges a right of way granted by the plaintiff's lessor, who has covenanted with the plaintiff for quiet enjoyment of the premises, both trespasser and lessor may be made defendants to an action for trespass, and relief prayed against the latter, under the covenant for quiet enjoyment, in case the former justifies his trespass (d); and the plaintiff need not elect at the hearing against which defendant to proceed (e), but he will have to pay the costs of any defendant against whom he obtains no relief (f). Alternative claims of this nature cannot be made by a counterclaim (g).

Where several persons are severally, or jointly and severally, liable on a contract, the plaintiff may join them all as defendants, or only proceed against some or one of them, as he pleases. If, having joined them all as defendants, some become bankrupt, he may proceed against the others without bringing the trustees in bankruptcy before the Court (h).

Order 16, r. 6.
Joinder of
defendants in
case of joint
liability.

If any defendant is only interested to a limited extent in the relief prayed, the Court, or the Judge in Chambers, may make any order which is just, to prevent his being embarrassed, or put to expense, by attending proceedings in which he has no interest; thus

Order 16, r. 5.
Defendant
slightly
interested.

(c) *Honduras Inter. Oceanic Co. v. Lefevre & Tucker*, 2 Ex. D. 301.

(d) *Child v. Stenning*, 5 Ch. D. 695.

(e) *Child v. Stenning*, 7 Ch. D. 413.

(f) *Marsh v. Dunlop*, 21 Sol. J. 75; *Child v. Stenning*, 7 Ch. D. 413.

(g) *Evans v. Buck*, 4 Ch. D. 432.

(h) *Lloyd v. Dimmick*, 7 Ch. D. 398.

the questions in which he is interested may be ordered to be tried first (i).

Partition Act,
1868, s. 8.
Parties to
partition
action.

Any person entitled to sue for partition may bring his action against any one or more of the other parties interested without making them all parties, but they must all be served with notice of judgment.

Order 16, r. 8.
Trustees, exe-
cutors, or
administrators
represent
their *cestui que*
trust.

Trustees, executors, and administrators, may sue, and be sued, in respect of the property or estate of which they are trustees or representatives, without joining as parties any of the persons beneficially interested, who will be considered to be sufficiently represented in the action by the trustees, executors, or administrators, unless otherwise ordered. In partition actions the *cestuis que trust* are sufficiently represented by the trustees for all purposes, and need not even be served with notice of judgment (k), and in a redemption action the trustees of the equity of redemption sufficiently represent their *cestuis que trust* (l), and it would seem that trustees sufficiently represent their *cestuis que trust* in all actions between them and strangers to the trust (m). Where the plaintiff's title depends on the construction of a will, he will be ordered to join, as co-defendants with the trustee, the persons interested in disputing his contention (n).

Order 16, rr.
33—36. Ad-
ministration

Any one residuary legatee or next of kin, legatee interested in a legacy charged on real estate, person

(i) *Cox v. Barker*, 3 Ch. D. 359, 371.

639; s. c. nom. *Jennings v. Jordan*, 6 App. Ca. 698.

(k) *Goodrich v. Marsh*, W. N. 78, p. 186; *Stace v. Gage*, 8 Ch. D. 451; *Simpson v. Denny*, 10 Ch. D. 28.

(m) *Cooper v. Vesey*, 20 Ch. D. 635.

(n) *Day v. Radcliffe*, 24 W. R. 844.

(l) *Mills v. Jennings*, 18 Ch. D.

interested in the proceeds of real estate directed to be sold, residuary devisee, heir, or *cestui que trust*, entitled to judgment or an order for the administration of the estate of any deceased person, or the execution of the trusts of any deed or instrument, may obtain such judgment or order without serving any of the other residuary legatees, next of kin, legatees, persons interested, residuary devisees, co-heirs, or *cestuis que trust*. at suit of beneficiary.

Any executor, administrator, or trustee, entitled to a judgment or order for administration, or the execution of a trust, may obtain such judgment or order in an action against any one legatee, next of kin, or *cestui que trust*. Order 16, r. 38. Administration at suit of executor or trustee

In an action to execute the trusts of a will, the heir-at-law is not a necessary party; but if the plaintiff desires to have the will established against him, he may make him a party. Order 16, r. 45. Heir-at-law unnecessary party.

If the right of the heir-at-law, next of kin, or class, depends on the construction to be put by the Court on any instrument, and it is difficult to ascertain the heir-at-law, next of kin, or class, the Court may, if it appears desirable that the question of construction should be determined before directing an inquiry as to who is or are the heir-at-law, next of kin, or class, appoint some one to represent such heir-at-law, next of kin, or class, and the judgment of the Court will be thereupon binding on the persons so represented (o). When the representatives of the classes have been appointed, the question of construction may, in a suitable case, be at Order 16, r. 32. Appointment of person to represent heir-at-law, next of kin, or class.

(o) For form of order, see *Chester v. Phillips*, 4 Ch. D. 230.

once decided on a summons to stay unnecessary inquiries (*p*).

Order 16, r. 16. **Married women.** Married women may sue and be sued as provided by the Married Women's Property Act, 1882, which enacts that a married woman shall be capable of suing and being sued, either in contract, or in tort, or otherwise, in all respects as if she were a *fême sole*. Married women, even where they have no separate estate, occupy the same position as other plaintiffs or defendants, and need not give security for costs (*q*).

Order 16, r. 16. **Infants.** Infants must sue as plaintiffs by a next friend, and defend by a guardian *ad litem* (*r*).

Order 16, r. 17. **Lunatics and persons of unsound mind.** Lunatics must sue and defend by their committee, and persons of unsound mind, not so found by inquisition, must sue by a next friend, and defend by a guardian *ad litem* (*s*).

Order 16, r. 20. **Authority of next friend.** Before the name of any person can be used as next friend of an infant or other party, or as relator, his written authority must be obtained and filed in the Central Office, or in the District Registry where the action is proceeding (*t*).

Order 16, r. 21. **Consent on behalf of persons under disability.** Any consent as to the mode of taking evidence, or any other procedure, given by the next friend, guardian, committee, or other person acting on behalf of parties

(*p*) *Beale v. Ruston*, W. N. 78, p. 179.

(*q*) *Severance v. Civil Service Supply Association*, 48 L. T. 485; *Threlful v. Wilson*, 8 P. D. 18.

(*r*) As to the appointment of a guardian *ad litem* of an infant, see *ante*, pp. 16, 19. For the practice prior to the Judicature Acts relating to actions by and against

infants, which still remains the same, see Daniell's Ch. Pr.

(*s*) For the practice prior to the Judicature Acts relating to suits by and against lunatics and persons of unsound mind, which still remains the same, see Daniell's Ch. Pr.

(*t*) This and the following rule are new.

under disability, with the consent of the Court or a Judge, will have the same force and effect as if such party were *sui juris* and consented; but to make the consent of the committee of a lunatic valid as between himself and the lunatic, the sanction of the Lord Chancellor or Lords Justices sitting in Lunacy must be obtained.

In actions for prevention of waste, or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest (*u*). Order 16, r. 37.
Protection of
property.

Where numerous parties have the same interest, one or more of them may sue or be sued, or may be authorised to defend, on behalf of the whole body. In an action against a company, one person can be appointed to represent all dissentient bondholders (*v*). Where one of several owners of a ship sues on behalf of himself and the others, the Court will not order the others to be joined as plaintiffs, merely to increase the defendant's security for costs (*w*). In a creditor's action for administration of both real and personal estate, the writ must state that the person suing does so on behalf of himself and all other creditors (*y*), but, if the statement of claim states that this is the case, the writ need not be amended should it have omitted to state it (*z*). Order 16, r. 9.
Body of per-
sons having
same interest.

(*u*) This rule is new, and seems to be covered by rule 9 of the same order, *infra*.

(*v*) *Fraser v. Cooper, Hall & Co.*, 21 Ch. D. 718.

(*x*) *De Hart v. Stevenson*, 1 Q. B. D. 318.

(*y*) *Worraker v. Pryor*, 2 Ch. D. 109; *Adcock v. Peters*, W. N. 76,

139; *Fryer v. Royle*, 5 Ch. D. 540; *Parham v. Vincent*, W. N. 77, p. 249; 26 W. R. 94; *Eyre v. Cox*, 24 W. R. 317; *Richardson v. Leake*, W. N. 79, p. 181; but see *contra*, *Cooper v. Blissett*, 1 Ch. D. 691, which may be regarded as overruled.

(*z*) *Eyre v. Cox*, 24 W. R. 317.

In actions for administration of personal estate only, a creditor may sue on his own behalf alone (a).

Order 16, r.
14.
Partners.

Partners may sue, and be sued, in the name of their firm, if they were co-partners in such firm at the time when the cause or action accrued (b), but, in such a case, they may be compelled, by an order of the Judge in Chambers, to furnish a statement of the names of the persons constituting the firm, to be given and verified as the Judge may direct, or, if plaintiffs, they may, as we have seen (c), be required by the defendant to disclose the names of the persons constituting the firm, on pain of all proceedings in the action being stayed. An order under this rule is not an order for discovery, so as to render a party disobeying it liable to attachment under Order 31, r. 20 (d).

Order 16, r. 15.
Individual
sued as firm.

Any person carrying on business in the name of a firm, apparently consisting of more than one person, may be sued in the name of the firm.

Order 16, rr. 7,
22—31.
Pauper.

Any person may be admitted to sue or defend as a pauper, on proof that he is not worth £25 (e) besides his wearing apparel and the subject matter of the action, and on production of the opinion of counsel as to the reasonableness of his claim or defence.

(a) *Naylor v. Blount*, 27 W. R. 865.

(b) The rule as altered removes the difficulties felt by the Court of Appeal in *Ex parte Young*, 19 Ch. D. 124, in cases of change of part-

nership.

(c) *Ante*, p. 13.

(d) *Pike v. Keen*, W. N. 76, p. 36; 24 W. R. 322.

(e) The amount has hitherto been £5.

CHAPTER IX.

GENERAL RULES AS TO PLEADINGS.

ALL pleadings must contain as concise a statement as possible of the material facts on which the pleader relies, but must not state the evidence by which the facts are to be proved, and must follow the forms given in the Appendix to the Rules as nearly as possible; and any longer forms will be deemed prolix, and the costs occasioned by such prolixity disallowed (a). Order 19, rr. 2, 4, 5. Pleadings to contain statement of facts only, and not evidence.

When the pleader relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases where particulars beyond those exemplified in the forms are necessary, they must be stated in the pleading (b). Order 19, r. 6. Particulars.

Every pleading must be divided into paragraphs, which must be numbered consecutively, and dates, sums, and numbers must be expressed in figures, not words. Order 19, r. 4. Paragraphs. Dates, sums, and numbers.

Pleadings, if settled by counsel, must be signed by him; Order 19, r. 4.

(a) It remains to be seen how far the forms prescribed in the Appendix will be adhered to; as the rules as to pleading remain substantially unaltered, it is submitted that any well drawn pleading settled before the rules came

into operation would run no risk of being objected to as prolix under the new rules.

(b) This rule seems to leave the mode of stating the particulars to the pleader's discretion.

Counsel's
signature.

if not settled by counsel, they must be signed by the solicitor, or by the party if he sues or defends in person (*b*).

Order 19, r. 9.
Printing.

Every pleading which contains more than ten folios must be printed.

Order 19, r. 11.
Delivery of
pleadings.

Every pleading must be delivered between the parties, and must be marked on the face with the date of delivery, the letter, number, and title of the action, the Division of the Judge to whom the action is assigned (*c*), the description of the pleading, and endorsed with the name and place of business of the solicitor or agent delivering it, or, if the party acts without a solicitor, the name and address of the party himself.

Order 19, r. 10.
Order 35, r. 19.
Order 67, r. 4.
Pleadings to
be delivered
by filing in
case of non-
appearance.

Pleadings and other documents may be delivered to any party who has made default in appearance, by filing them at the Central Office, or, if the action is proceeding in a District Registry, by filing them in the District Registry. The rule is permissive, not directory, and personal service of the statement of claim, along with the writ, on a defendant who fails to appear, will render it unnecessary afterwards to file the statement of claim (*d*). Where the defendant has become bankrupt after appearance, and his trustee in bankruptcy has been made a defendant, but has not appeared, it is unnecessary to file the pleadings, as the trustee stands in the exact position of the bankrupt, and must be taken to have appeared (*e*).

(*b*) Under the old rule, counsel's signature was unnecessary in any event.

(*c*) The rule does not require the name of the Judge to be stated in the pleading, but it would ap-

pear to be convenient to do so, even if not obligatory.

(*d*) *Renshaw v. Renshaw*, W. N. 80, p. 7; 49 L. J. Ch. 127.

(*e*) *Chorlton v. Dickie*, 13 Ch. D. 180.

If any party desires to deny the right of another party to claim as executor, or as trustee, in bankruptcy or otherwise, or in any representative capacity, or in any capacity whatever, or if he desires to deny the constitution of a partnership, he must do so specifically; and the denial must not be evasive, but must answer the point of substance (*f*).

Order 21, r. 5.
Denial of right to claim in any special capacity.

Every allegation of fact contained in any pleading which is not denied specifically, or by necessary implication, or stated to be not admitted, in the pleading of the opposite party, will be taken as admitted, except against an infant, or lunatic, or person of unsound mind, not so found by inquisition. A statement that the defendant does not admit, but puts the plaintiff to the proof of specified paragraphs of the statement of claim, will not do, and operates as an admission (*g*), except, it would seem, in the case of executors with reference to acts of their testator of which they can have no knowledge (*h*).

Order 19, r. 13.
Allegations admitted if not denied;
except against infants and lunatics.

A mere general denial is not sufficient, but the denial must deal specifically and without evasion with each allegation of fact, except damages, which it is desired to deny, and must answer the point of substance (*i*): but a joinder of issue by the plaintiff on the defence, or by any other party on the reply, will operate as a denial of every allegation on which issue is joined. Where a

Order 19, rr. 17, 19. Denial to be specific.

r. 18. Joinder of issue.

(*f*) *Thorp v. Holdsworth*, 3 Ch. D. 637.

(*g*) *Rutter v. Tregent*, 12 Ch. D. 758; *Harris v. Gamble*, 7 Ch. D. 877.

(*h*) *Smith v. Gamlen*, W. N. 81, p. 110.

(*i*) This rule will be most strictly construed. *Thorp v. Holdsworth*, 3 Ch. D. 637; *Byrd v. Nunn*, 5 Ch. D. 781; s. c. 7 Ch. D. 284; and see *Tildesley v. Harper*, 7 Ch. D. 403; 10 Ch. D. 393.

general denial of any allegation is followed by a particular denial, the former will be controlled by the latter (*l*).

Order 21, r. 4. No denial or defence as to damages claimed, or their
 Damages. amount, shall be necessary; but, unless expressly admitted, they will be deemed in issue in all cases.

Order 19, r. 15. The defendant or plaintiff (as the case may be) must
 Surprise. raise by the pleading all matters which show that the action or counterclaim is not maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply as, if not raised, would be likely to take the opposite party by surprise, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality by statute or common law, or Statute of Frauds. Thus, the defence of being purchaser for value without notice must be specifically pleaded (*m*); so in pleading a contract it must be stated whether it is in writing, and a general statement that it was agreed will not be sufficient (*n*); and in a partition action the plaintiff should show under what section of the Act he intends to proceed, so as to avoid surprise (*o*); and in an action to establish a right of way the plaintiff must state whether he claims the right by prescription or grant (*p*).

Order 19, r. 20. The bare denial of a contract will be construed only

(*l*) *Collette v. Goode*, 7 Ch. D. 842.

(*m*) *Att.-Gen. v. Biphosphated Guano Co.*, 11 Ch. D. 337.

(*n*) *Turgand v. Fearon*, 40 L. T. 543; but see *Futcher v. Futcher*,

50 L. J. Ch. 735.

(*o*) *Evans v. Evans*, W. N. 83, p. 43; 31 W. R. 495.

(*p*) *Harris v. Jenkins*, 22 Ch. D. 481.

as a denial of its actual making, and not of its legality ^{Denial of contract.} or sufficiency in law, whether with reference to the Statute of Frauds or otherwise. Not only must the defendant plead the statute, but the facts required to show how he relies on it must be set out (q).

Where the contents of a document are material, it is ^{Order 19, r. 21. Document.} sufficient, unless the precise words are material, simply to state its effect without setting it out at length.

Where the cause of action is a stated or settled ^{Order 20, r. 8. Settled accounts.} account, it must be alleged with particulars; but where it is relied on only by way of evidence or admission of some other cause of action, it must not be pleaded.

Where it is material to allege malice, fraudulent ^{Order 19, r. 22. Condition of mind.} intention, knowledge, or any other condition of mind, it is sufficient to state the condition of mind as a fact, without stating the circumstances from which it is to be inferred; and any such statement will be struck out (r).

Where it is material to allege notice to any one of ^{Order 19, r. 23. Notice.} any fact, it is sufficient, unless the form of notice is material, simply to state the notice as a fact.

Where a contract or special relation between different ^{Order 19, r. 24. Contract collected from correspondence.} persons is to be implied from a series of letters, conversations, or circumstances, it is sufficient to state the contract or special relation as a fact, merely referring to the letters, conversations, or circumstances, without setting them out in detail; but it must appear clearly whether the agreement is in writing or merely by

(q) *Pullen v. Snelus*, 27 W. R. 534.

(r) *Herring v. Bischoffsheim*, W. N. 76, p. 77.

parol (s). If reliance is intended to be placed on more than one contract or special relation, they may be stated in the alternative.

Order 19, r. 14. **Condition precedent.** Any condition precedent, the performance or occurrence of which is contested, must be distinctly pleaded; but subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the pleader shall be implied in his pleading.

Order 19, r. 26. **Presumption of law.** It is unnecessary to state in any pleading anything which the law presumes in favour of the pleader, or of which the burden of proof lies on the other side, unless it has first been specifically denied.

Order 21, r. 21. **Actions for recovery of land.** In actions for recovery of land it is sufficient for a defendant, who is in possession by himself or his tenant, and who does not rely upon any equitable estate, right, or title, for his defence, to state simply that he is in possession, and he need not plead his title; and a denial of the allegations contained in the statement of claim shall be implied from such statement (t). With this one exception, both 'plaintiff (u) and defendant (x) are subject to the ordinary rules of pleading.

Order 19, r. 16. **Inconsistent pleadings.** No pleading must contain any new ground of claim or allegation of fact, which is inconsistent with the previous pleadings of the party delivering it, but such fresh matter must be introduced by amendment.

Order 19, r. 26. **Technical objection.** No technical objection can be raised to any pleading on the ground of any alleged want of form.

(s) *Turquand v. Fearon*, 40 L. T. 543; but see *contra*, *Futcher v. Futcher*, 50 L. J. Ch. 735.

(t) The rule is altered in accordance with the decision of the House of Lords in *Danford v.*

McAnulty, W. N. 83, p. 107.

(u) *Philipps v. Philipps*, 4 Q. B. D. 127.

(x) *Sutcliffe v. James*, 27 W. R. 750.

A further and better statement of the nature of the claim, or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, on such terms as to costs and otherwise as are just (y).

Any party who has obtained an order for delivery of further particulars will, unless otherwise ordered, have the same time for pleading after the delivery of the particulars as he had at the return of the summons, but an order for particulars will not otherwise operate as a stay of proceedings or extension of time, unless specially provided in the order.

(y) The rule is new, but under the old rule as to amendment it was open to any party to get a similar order.

Order 19, r. 7.
Further particulars.

Order 19, r. 8.
Time for pleading after delivery of particulars.

CHAPTER X.

SPECIAL CASE.

Order 34, r.
1. Special
case by
consent.

THE parties to any cause or matter may concur in stating the questions of law arising in the action, in the form of a special case, for the opinion of the Court.

Order 34, r. 2.
Special case
by order.

Where it appears in any action to the Court, or the Judge in Chambers, from the pleadings or otherwise, that there is any question of law which it would be convenient to have decided before going into evidence, or trying the issues of fact, or referring the case to a referee or arbitrator, the Court, or the Judge in Chambers, may order the question of law to be raised by a special case; and all such further proceedings as are rendered unnecessary by the decision of the question of law thus raised may be thereupon stayed. The order may be made before delivery of a statement of claim on application by summons, supported by affidavit (a).

Order 34, r. 6.
Agreement to
pay fixed sum.

The parties to a special case may agree in writing that, on judgment being given, a sum of money, fixed by the parties or to be ascertained by the Court, shall

(a) *Metropolitan Board of Works v. New River Co.*, 1 Q. B. D. 727; s. c. 2 Q. B. D. 67; 25 W. R. 175.

be paid by one party to the other, either with or without costs, and judgment may be entered accordingly, and execution issued thereon forthwith, unless stayed on appeal. Such agreement is not liable to stamp duty.

Every special case must be divided into paragraphs, numbered consecutively, and must state concisely such facts and documents as will enable the Court to decide the question raised. Order 34, r. 1. Form of special case.

Every special case must be printed by the plaintiff and signed by all the parties, or their respective counsel or solicitors, and must be filed by the plaintiff in the Central Office, or in the District Registry where the action is proceeding. Order 34, r. 3. Special case must be printed, signed by all parties, and filed.

Where all the parties are *sui juris*, the special case may be entered for argument by delivering to the Registrar's clerk (b) a memorandum of entry; but where a married woman (not being a party in respect of her separate property, or any separate right of action by or against her (c)), infant, or person of unsound mind is a party to the action, it can only be entered for argument by leave of the Court, or the Judge in Chambers, which will only be granted on production of evidence of the truth of the statements contained in the special case, so far as they affect the interests of the married woman, infant, or person of unsound mind; and a copy of the order giving leave must be produced to the Registrar's clerk at the time the memorandum of Order 34, rr. 4, 5. Entry for argument. Leave necessary where any party is under disability.

(b) Daniell's Ch. Pr.

(c) The words in brackets are new.

entry is delivered. The action should be set down on motion for judgment at the time the special case is entered, so as to enable the answers to be taken in the form of a declaratory judgment (*d*).

Order 34, r. 1.
Facts and
documents
to be treated
as if proved.

Upon the argument of a special case, the Court and the parties may refer to all documents mentioned in the special case, and the Court may draw from the facts and documents stated in it any inference of fact or law which might have been drawn from them if proved at the trial.

(*d*) *Harrison v. Cornwall Minerals Railway Co.*, 16 Ch. D. 67.

CHAPTER XI.

STATEMENT OF CLAIM.

WHERE any defendant (other than an infant or person of unsound mind (a)) fails to appear within the time limited for appearance, the plaintiff, on filing an affidavit of service and a statement of claim, may proceed with the action as if such defendant had appeared. Where the statement of claim has been served personally along with the writ, it need not afterwards be filed, on the defendants making default in entering an appearance (b). The fact that an order has been made under Order 15 does not preclude the delivery of a statement of claim (c).

Subject to delivery of a statement of claim in default of appearance, as above provided, no statement of claim need be delivered, unless the defendant, at the time of entering an appearance, or within eight days afterwards, give notice in writing to the plaintiff or his solicitor that he requires its delivery (d).

(a) See *ante*, p. 18, as to proceeding in default of appearance. No time is prescribed for delivery of the statement of claim, and it is presumed that delivery would be good as long as the writ remained in force.

(b) *Renshaw v. Renshaw*, W. N. 80, p. 7; 49 L. J. Ch. 127.

(c) *Jones v. Chennell*, 8 Ch. D. 498; *Gatti v. Webster*, 12 Ch. D. 771.

(d) Under the old rule the plaintiff was bound to deliver a state-

Order 13, r. 12.
Default of
appearance.

Order 20, r. 1
(b). Delivery
on request.

Order 20, r.
1 (c). Time for
delivery.

Where the defendant gives notice that he requires the delivery of a statement of claim, the plaintiff must deliver a statement of claim (e) within five weeks from the time when he receives such notice.

Order 20, r.
1 (d), (e). De-
livery of
although dis-
pensed with.

The plaintiff may deliver a statement of claim either with the writ or at any time afterwards within six weeks from the date of the defendant's appearance, notwithstanding that the defendant has appeared and stated that he does not require its delivery, but if he does so, he may be ordered to pay the costs occasioned by its delivery, if improper or unnecessary.

Order 20, r. 5.
Place of trial.

If the plaintiff desires to have the action tried elsewhere than in Middlesex, he must name the place where he wishes to have it tried, in his statement of claim.

Order 21, r. 6.
Relief claimed.

The statement of claim must state specifically the relief claimed, whether claimed simply, or in the alternative; but a claim for general relief need not be added, but may always be given, if thought just, to the same extent as if asked for. A claim for general relief will not, it has been held, entitle the plaintiff to relief inconsistent with the allegations in the statement of claim, or with the terms of the express prayer (f).

Order 21, r. 7.
Separate
claims.

Where relief is sought in respect of several separate and distinct claims, founded on separate and distinct facts, the facts supporting each claim must, as far as possible, be stated separately and distinctly in the statement of claim.

ment of claim, unless required not
to do so.

(e) For forms of statement of

claim, see App. No. 15a, 16a.

(f) *Cargill v. Bower*, 47 L. J.
Ch. 649.

Prolivity must, as we have seen (*g*), be avoided by as close a use of the prescribed forms as possible, in all pleadings, and facts only, and not evidence, must be stated. Where the statement of claim offends against this rule, the offending matter (*h*), or, in an extreme case, the whole statement of claim (*i*), will be struck out on the application of the defendant (*k*), or the plaintiff may be ordered, at the trial, to pay the costs occasioned by its prolivity.

On delivery of a statement of claim, the plaintiff may alter, modify, or extend his claim, without amending the endorsement of the writ (*l*).

Order 19, rr.
2, 4.
Prolivity.

Order 20, r. 4.
Amendment
of writ un-
necessary.

(*g*) *Ante*.

(*h*) *Herring v. Bischoffsheim*, W. N. 76, p. 77; *Blake v. Albion Life Assurance Co.*, 24 W. R. 677; 45 L. J. C. P. 663.

(*i*) *Cashin v. Cradock*, 3 Ch. D. 376; *Davy Bros. v. Garrett*, 7 Ch. D. 473; *Marsh v. Mayor of Ponte-*

fract, W. N. 76, p. 7.

(*k*) See generally as to amending and striking out pleadings, *post*, Chapter XXIII.

(*l*) This rule, which is new, follows the ruling of the late Master of the Rolls in *Large v. Large*, W. N. 77, p. 198.

CHAPTER XII.

DEFENCE.

Order 21, r. 6.
Time for delivery.

WHERE a statement of claim has been delivered to the defendant, he must deliver a defence (a) within ten days from the delivery of the statement of claim, or from the expiration of the time limited for his appearance, whichever last happens, unless the time is extended by the Court or Judge, or by written consent.

Order 21, r. 7.
Delivery though no statement of claim.

Where the plaintiff has not delivered a statement of claim, any defendant who has appeared must deliver his defence (if any) within ten days from the date of his appearance, unless the time is extended.

Order 19, rr. 13, 17, 19.
Allegations not denied admitted.

The defendant must, as we have seen (b), deny specifically, and without evasion, or refuse to admit, every allegation in the statement of claim which he does not desire to admit, or it will be taken as admitted against him (c), unless he is an infant, or lunatic, or person of unsound mind. A statement that the defendant does not admit, but puts the plaintiff to

(a) For forms of defence, see App. No. 15b, 16b, 17b.

(b) *Ante*, p. 37.

(c) *Thorpe v. Holdsworth*, 3 Ch.

D. 637; *Byrd v. Nunn*, 5 Ch. D. 781; s. c. 7 Ch. D. 284; *Tildesley v. Harper*, 7 Ch. D. 403; *Collette v. Goode*, 7 Ch. D. 842.

the proof of specified paragraphs of his statement of claim, will not do, but operates as an admission (*d*), except, it would seem, in the case of executors in respect of acts of their testator of which they can have no knowledge (*e*). If the defendant, by improperly denying, or omitting to admit, any allegation in the statement of claim, causes any extra costs, he may be ordered to bear such costs himself.

Order 21, r. 9.
Costs of improper denial.

Prolivity must, as we have seen (*f*), be avoided, by as close a use of the prescribed forms as possible, in all pleadings, and facts only, and not evidence, stated.

Order 19, rr. 2, 4, 5.
Prolivity.

Where any ground of defence arises after the commencement of the action, but before the defendant has delivered his defence, and before the time for so doing has expired, it may be pleaded in the defence, either alone, or together with other grounds of defence, or, if it arises after the delivery of the defence, or after the time for its delivery has expired, the defendant may, within eight days from the time that the ground of defence has arisen, or at any subsequent time, by leave of the Court or the Judge, deliver a further defence setting forth the fresh ground of defence (*g*). In either case the plaintiff may deliver a confession of the defence (*h*), and sign judgment for his costs up to the time the defence, or further defence, as the case may be, was delivered; even where the further defence is the plain-

Order 24, r. 1.
Defence arising after action commenced.

r. 2. Further defence.

r. 3. Confession of defence.

(*d*) *Harris v. Gamble*, 7 Ch. D. 877; *Rutter v. Tregent*, 12 Ch. D. 758.

(*e*) *Smith v. Gamlen*, W. N. 81, p. 110.

(*f*) *Ante*, p. 35; see also *Heap*

v. Maris, 2 Q. B. D. 630.

(*g*) Under the old rule leave was necessary to deliver a further defence at any time.

(*h*) For form of confession of defence, see App. No. 18.

tiff's bankruptcy (*i*). To enable the plaintiff to confess and sign judgment for his costs, the ground of defence arising after the commencement of the action must be a substantive one, and must not go merely to reduction of damages (*k*).

Order 22, r. 3.
Tender before
action.

Where the defence sets up a tender before action brought, the sum alleged to have been tendered must be brought into Court.

(*i*) *Foster v. Gamgee*, 1 Q. B. D. 666; *Campion v. Formby*, 7 Ch. D. 373. (*k*) *Callander v. Hawkins*, 2 C. P. D. 592.

CHAPTER XIII.

COUNTERCLAIM.

ANY defendant may set off, by way of counterclaim (a), Order 19, r. 3. against the claims of the plaintiff, any right or claim Order 21, r. 11. which he may have against him, either alone or jointly Counterclaim against plaintiff alone or jointly with other persons. with any other persons, whether such other persons are already parties to the action or not; and the counterclaim will have the effect of a cross action, so as to enable the Court to pronounce a final judgment on both claim and counterclaim in the same action. The counterclaim must be against the plaintiff in the same character in which he sues (b). Damages claimed by way of counterclaim need not be limited to the date when the writ was issued (c). Where the counterclaim is founded on facts which have occurred since the issue of the writ, it must, it seems, be so stated in the counterclaim, or it will be struck out (d). It would seem that a defendant may be compelled to abandon a cross action commenced after the original action, and proceed by

(a) For forms of counterclaim, see App. No. 16b and 17b.

(b) *Per* Lindley, J., in *McDonald v. Carington*, 4 C. P. D. 38.

(c) *Beddall v. Maitland*, 17 Ch. D. 174; and see *McGowan v. Mid-*

dleton, W. N. 83, p. 75; 52 L. J. Q. B. 355, overruling *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 713.

(d) *Ellis v. Munson*, W. N. 76, p. 253; 35 L. T. 585.

way of counterclaim (*e*). On the death of a counterclaiming defendant, his personal representative may obtain an order of revivor, and proceed with the counterclaim (*f*). It has been held that the plaintiff in the original action may counterclaim by his reply (*g*).

Order 21, r. 16.
Discontinu-
ance.

Where the plaintiff has stayed, discontinued, or dismissed his action, the defendant may still proceed with his counterclaim (*h*).

Order 16, r. 3.
Misjoinder.

Where any person has been improperly joined as co-plaintiff, and the defendant has counterclaimed, the fact of such misjoinder will not deprive the defendant of the benefit of his counterclaim against the other parties.

Order 20, r. 6.
Statement of
relief claimed.

The counterclaim must state specifically the relief claimed, either simply, or in the alternative; but a claim for general relief need not be added, but will be implied.

Order 20, r. 7.
Distinct
claims.

Where relief is sought by a counterclaim in respect of several separate and distinct claims, founded on separate and distinct facts, the facts supporting each claim should, so far as possible, be separately and distinctly stated. Separate counterclaims may be made by the same defendant against different plaintiffs (*i*).

Order 21, r. 10.
Counterclaim
to be distinct.

Where the defendant relies on any grounds as supporting a right of counterclaim, he must in his defence state specifically that he does so by way of counterclaim. It is sufficient for the defendant to say that he

(*e*) *Thomson v. S. E. Ry. Co.*, 9 Q. B. D. 320.

(*f*) *Andrew v. Aitken*, 21 Ch. D. 175.

(*g*) *Toke v. Andrews*, 8 Q. B. D. 428.

(*h*) This rule is new, and adopts

the ruling of the House of Lords in *McGowan v. Middleton*, W. N. 83, p. 75.

(*i*) *Manchester, Sheffield & Lincolnshire Ry. Co. v. Brooks*, 2 Ex. D. 243.

relies on the facts stated in certain specified paragraphs of the statement of claim and of defence, and thereupon counterclaims, and he need not reprint them (*k*); and it has even been held sufficient for him to say, "and by way of counterclaim the defendant repeats the several matters hereinbefore stated and admitted, and claims as follows" (*l*); or even in the concluding paragraph of the defence to refer to foregoing statements, and claim a set-off (*m*).

Where the defendant sets up a counterclaim raising questions between himself and the plaintiff along with other persons, he must add to the title of his defence a further title, giving the names of the persons who, if the counterclaim were a cross action, would be defendants (*n*). It is not necessary that the relief claimed against the third person should be identical with that claimed against the plaintiffs (*o*), but no person against whom relief is only claimed in one of two inconsistent alternatives, can be made a defendant to the counterclaim (*p*). Persons joined with the original plaintiff as defendants to a counterclaim would not, it seems, be allowed to interrogate him (*q*).

Order 21, r. 11.
Further title.

The defence and counterclaim must be delivered to Order 21, r. 11.

(*k*) *Birmingham Estates Co. v. Smith*, 13 Ch. D. 506, where *Holloway v. York*, 25 W. R. 627, is explained.

(*l*) *Green v. Sevin*, 13 Ch. 589.

(*m*) *Lees v. Patterson*, 7 Ch. D. 866. This, however, seems rather a doubtful decision, and hardly reconcilable with the earlier cases of *Croue v. Barnicott*, 6 Ch. D. 753; *Hillman v. Mayhew*, 24 W. R. 485; and *Holloway v. York*,

supra.

(*n*) For form of counterclaim, see App. No. 17b.

(*o*) *Turner v. Hednesford Gas Co.*, 3 Ex. D. 145; *Dear v. Swoorder*, 4 Ch. D. 476.

(*p*) *Evans v. Buck*, 4 Ch. D. 432; but see *Horrocks v. Rigby*, 26 W. R. 714.

(*q*) *Molloy v. Kilby*, 15 Ch. D. 162.

Time for
delivery to
defendants
already
parties.

any defendant to the counterclaim, who is also a defendant to the original action, within the period limited for its delivery to the plaintiff, namely, within ten days from delivery of the statement of claim, or from the expiration of the time limited for appearance, whichever last happens.

Order 21, r. 12.
Service on
defendants
not already
parties.

If any defendant to the counterclaim is not already a party to the action, he must be served with a copy of the defence and counterclaim, endorsed with a notice calling on him to appear within eight days (*r*), service being regulated by the rules relating to the service of the writ; and the person so served must appear in the same way as if served with a writ in an original action (*s*). Should he appear without having been served, the appearance may be discharged by the counterclaiming defendant on motion (*t*).

r. 13. Ap-
pearance.

Order 19, r. 3.
Order 21, r. 15.
Exclusion of
counterclaim.

The Court, or Judge, may, on the application of the plaintiff, at any time before trial of the action, or, on the application of any other defendant to the counterclaim, at any time before reply, order the counterclaim to be excluded, or otherwise refuse permission to the defendant to avail himself of it, if the claim raised by it cannot be conveniently disposed of in the action, or ought to be raised in an independent action. An order excluding the counterclaim will be made, where its subject-matter is entirely different from

(*r*) For form of notice, see App. No. 19.

(*s*) It will be observed that no time is limited within which the counterclaim is to be served on such defendants to it as are not already parties to the action; it

would seem, however, that it must be served within the time limited for delivery of the defence and counterclaim to the plaintiff.

(*t*) *Fraser v. Cooper, Hall & Co.*, W. N. 83, p. 110; 31 W. R. 714.

that of the original claim (*u*); or where the counterclaim is against the plaintiff in a different character to that in which he sues (*x*); or where some other cause of action is without leave joined with a counterclaim for recovery of land (*y*). A debt covered by a judgment in another division is not a proper subject for a counterclaim, which, in such a case, will be ordered to be excluded (*z*); it would seem to be a sufficient ground for making the order, that the plaintiff is likely to be delayed by the counterclaim (*a*); or, on a counterclaim by husband and wife, that the husband was a mere formal defendant (*b*). A strong case must be made to induce the Court of Appeal to interfere with the discretion of the Court below as to the exclusion of a counterclaim (*c*). Where the defendant undertakes to bring a separate action to enforce the claim raised by his counterclaim, the costs of a successful motion to exclude the counterclaim will be made costs in the action to be brought by the defendant (*d*).

Where, on the hearing of the action (*e*), a balance is found in favour of a defendant succeeding on his counterclaim. Order 21, r. 17.
Judgment on
counterclaim.

(*u*) *Padwick v. Scott*, 2 Ch. D. 736; *Harris v. Gamble*, 6 Ch. D. 748; *Naylor v. Farrer*, W. N. 78, p. 187; 26 W. R. 809; *Barber v. Blaiberg*, 19 Ch. D. 473; but see and consider *Gray v. Webb*, 21 Ch. D. 802; *Hodson v. Mochi*, 8 Ch. D. 569; and *Quin v. Hesson*, 40 L. T. 70.

(*x*) *McDonald v. Carington*, 4 C. P. D. 28; and see *The Sir Charles Napier*, 42 L. T. 167.

(*y*) *Compton v. Preston*, 21 Ch. D. 138.

(*z*) *Birmingham Estates Co. v.*

Smith, 13 Ch. D. 506; and see *Gat hercole v. Smith*, 44 L. T. 439.

(*a*) *Gray v. Webb*, 21 Ch. D. 802; but see *Bartholomew v. Rawlings*, W. N. 76, p. 56.

(*b*) *Hodson v. Mochi*, 8 Ch. D. 569.

(*c*) *Huggons v. Tweed*, 10 Ch. D. 359.

(*d*) *Maclay v. Sharp*, W. N. 77, p. 216; but see *Naylor v. Farrer*, W. N. 78, p. 187; 26 W. R. 809.

(*e*) *Rolfe v. Maclaren*, 3 Ch. D. 106.

counterclaim, the Court may give judgment for the defendant for the balance in his favour, or may adjudge him any other relief to which he is found entitled. The mode of taking the evidence at the trial in case of claim and counterclaim depends upon the circumstances of each case, and no general rule can be laid down (g).

Order 65, r. 2.
Costs of
counterclaim.

Where issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues shall, unless otherwise ordered, follow the event. Hitherto, where both claim and counterclaim are dismissed with costs, the defendant has been allowed the general costs of the action, and the plaintiff only allowed the amount by which the costs have been increased by reason of the counterclaim (h), and the same principle has been held applicable where both claim and counterclaim are successful (i).

(g) *Thompson v. Woodfine*, 26 W. R. 678.

(h) *Saner v. Bilton*, 11 Ch. D. 416; approved by Court of Appeal in *Mason v. Brentini*, 15 Ch. D. 287.

(i) *Ward v. Morse*, 23 Ch. D. 377. It would seem that in the absence of special directions at the trial, the taxing master will not be justified now in taxing the costs on this principle.

CHAPTER XIV.

THIRD PARTY PROCEDURE.

IF the defendant is entitled to contribution or indemnity against any other person than the plaintiff, he may, by leave of the Court, or the Judge, issue a notice to that effect, called "third party notice" (a). It has latterly been the practice to apply *ex parte* for leave to issue the notice, and to leave the plaintiff to move to discharge the order if he thinks fit (b). The order will not be made absolute, it would seem, against the plaintiff's wishes (c); or, at any rate, where he can show that he would be embarrassed by the joinder of third parties (d). It is not necessary that the whole question between the defendant and the third party should be identical with that between the plaintiff and defendant, but it is a sufficient ground for the application, that there is some material question which

Order 16, rr. 48, 55.
Question between defendant and third parties.

(a) It will be observed that the rule is now limited to cases of contribution or indemnity; the old rule applied to any relief.

(b) *Corrie v. Allen*, 48 L. T. 464.

(c) *Marner v. Bright*, 11 Ch. D. 394; *Treleaven v. Bray*, 1 Ch. D. 176; and see *Associated Home Co.*

v. Whichcord, 8 Ch. D. 457; *Horwell v. London Omnibus Co.*, 2 Ex. D. 365, 382.

(d) *Bower v. Hartley*, 1 Q. B. D. 652; *Wye Valley Ry. Co. v. Hawes*, 16 Ch. D. 489; *Schneider v. Batt*, 8 Q. B. D. 701; *The Bianca*, 8 P. D. 91; *Blaina Iron Co. v. Garbutt*, 46 L. T. 162.

is common to all parties (*e*). Leave will be given to a defendant to serve the trustee of a co-defendant, who has become bankrupt, with notice (*f*). Where there is plausible ground for joining a third party, he is wrong to resist the order, and, though ultimately dismissed from the action, may have to bear the costs of opposing the order to join him (*g*). A strong case must be made to induce the Court of Appeal to interfere with the discretion of the Court below as to granting leave (*h*).

Order 16, r. 48.
Notice to be
filed and
served.

The defendant, on leave being obtained, must file a copy of the third party notice, which must specify the ground of the claim (*i*), at the Central Office, or in the District Registry where the action is proceeding, and must serve the notice, stamped with the seal used for sealing writs, on the person against whom he claims contribution or indemnity, within the time limited for delivering his defence to the plaintiff, unless the time is enlarged; and must, also, serve with the notice a copy of the statement of claim, or of the writ, if no statement of claim has been delivered. Service of the notice is regulated by the rules relating to the service

Service out of
jurisdiction.

of writs; notice may therefore be served out of the jurisdiction (*k*).

(*e*) *Swansea Shipping Co. v. Duncan*, 1 Q. B. D. 644; *Bower v. Hartley*, 1 Q. B. D. 652; *Hornby v. Cardwell*, 8 Q. B. D. 337.

(*f*) *Re Collie*, 2 Ch. D. 51;

Lloyd v. Dimmack, 7 Ch. D. 398.

(*g*) *Beynon v. Godden*, 4 Ex. D. 246.

(*h*) *Schneider v. Batt*, 50 L. J.

Q. B. 396.

(*i*) For form of notice, see App. No. 20.

(*k*) *Swansea Shipping Co. v. Duncan*, 1 Q. B. D. 644; *Nixon v. Luckie*, W. N. 80, p. 12; but see *Potters v. Milton*, 31 W. R. 858.

If a person not a party to the action (*l*), who is served with third party notice, wishes to dispute the plaintiff's claim in the action against the defendant giving the notice, or his own liability to such defendant, he must enter an appearance in the action within eight days from service of the notice, unless the time is extended, and in default of appearance he will be deemed to admit the validity of any judgment, by consent or otherwise, against such defendant, and his own liability to contribute or indemnify to the extent claimed in the notice.

Where the third party makes default of appearance, and the defendant suffers judgment by default, he may at any time after satisfaction of the judgment against him, or before such satisfaction, by leave of the Court or a Judge, enter judgment against the third party to the extent claimed by the third party notice, subject to power in the Court or Judge to vary or set aside the judgment on such terms as seem just.

Where the third party makes default of appearance, and the action results in favour of the plaintiff, the Judge trying the action, or to whom it is assigned, may, at or after trial, enter such judgment for the defendant giving the third party notice as the nature of the case requires; but execution cannot issue, except by leave of the Judge, till satisfaction by the defendant of the judgment against him.

(*l*) It does not appear clear whether a co-defendant served with third party notice need enter a second appearance, if he has already appeared in the action; it is

presumed not, although the 55th rule does say the same procedure is to be adopted as if he were a third party.

Order 16, r. 49.
Appearance.

Order 16, r. 50.
Judgment by
default.

Order 16, r. 51.
Default of
appearance.

Order 16, r.
52, 53.

Court or judge may direct how action is to proceed.

If the party served with third party notice appears, the defendant may apply to the Court, or the Judge in Chambers, for directions, and the Court or Judge may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, either in whole or in part, give leave to the party served to defend, and give directions as to the delivery and amendment of pleadings, and as to the steps to be taken for trying the question between the defendant and the party served with notice, either at or after the trial, and may settle to what extent such party is to be bound by the judgment; or may order such judgment to be entered for the defendant, giving the notice as the nature of the case may require, against the third party, if not satisfied that there is any question to be tried (*m*). It is very desirable that the order as to the mode of trial should be so framed as to put the matter in proper train for deciding all the questions between the defendant and third party (*n*). Leave may be given to the third party in his turn to serve notice on other third parties (*o*). The plaintiff is entitled to discovery from the third party (*p*).

Order 16, r. 54.
Costs.

The Court or Judge may decide all questions of costs as between a third party and the other parties to the action, and order any one or more to pay the costs of

(*m*) For form of order, see *Benecke v. Frost*, 1 Q. B. D. 419; *Witham v. Vane*, 28 W. R. 276.

(*n*) *The Cartsburn*, 41 L. T. 714, per James, L.J.

(*o*) *Witham v. Vane*, 28 W. R.

276; *Fowler v. Knoop*, W. N. 77, p. 68; 36 L. T. 219; but see *contra Walker v. Balfour*, 25 W. R. 511.

(*p*) *McAllister v. Bishop of Rochester*, 5 C. P. D. 194.

the others or other, or give such direction as to costs as the justice of the case requires.

Where contribution or indemnity is claimed against a co-defendant, the same notice is to be issued, and the same procedure adopted for having the question determined, as if he were a third party; but the plaintiff's rights against any defendant are not to be thereby prejudiced.

Order 16, r. 55.
Co-defendant.

CHAPTER XV.

REPLY TO DEFENCE ALONE.

Order 23, r. 1.
Time for delivery.

WHERE no counterclaim has been delivered, the plaintiff must deliver his reply (if any) (a) within three weeks from the delivery of the last statement of defence, unless the time is enlarged. The plaintiff is not bound to deliver his reply till the time for delivering every defence has expired, and even then he may, without an order, give further leave for the delivery of any defence, and so postpone the delivery of his own reply (b).

Order 19, r. 18.
Joinder of issue.

The plaintiff may, in his reply, join issue on the defence, which joinder of issue will operate as a denial of every material allegation in the defence, except those which he expressly admits, or excepts from its operation.

Order 19, r. 16.
Inconsistent pleadings.

No pleadings must raise any new ground of claim, or contain any allegation of fact inconsistent with the party's previous pleadings (except by way of amendment). With this exception (c), there is no limit to what may be said in reply, so long as scandal, or irrelevance, is avoided, and the plaintiff may intro-

(a) For form of reply, see App. 759.

No. 15c.

(b) *Ambrose v. Evelyn*, 11 Ch. D.

(c) *Williamson v. London and N. W. Ry. Co.*, 12 Ch. D. 787.

duce into it fresh matter, and may both traverse, and Fresh matter. confess and avoid (*d*), but must not raise new claims to relief (*e*).

If the plaintiff fails to deliver a reply within the time Order 27, r. 13. limited for so doing, the pleadings will be deemed to be Default of reply closed, and all the material statements of fact in the defence to which he fails to reply will be deemed to have been denied and put in issue (*f*).

(*d*) *Hall v. Eve*, 4 Ch. D. 341, overruling *Earp v. Henderson*, 3 Ch. D. 254; and *London and Katharine Docks Co. v. Metropolitan Ry. Co.*, W. N. 76, p. 272; 35 L. T. 733, so far as those judgments proceeded on the assumption that no new matter could be pleaded in the reply; see also *Collett v. Dickenson*, 26 W. R. 403;

Williamson v. London and N. W. Ry. Co., 12 Ch. D. 787.

(*e*) *Williamson v. London and N. W. Ry. Co.*, *supra*.

(*f*) This rule is new, and appears to render a reply unnecessary, unless the plaintiff desires to admit any part of the defence or introduce fresh matter. See, however, Order 19, r. 13, *ante*, p. 37.

CHAPTER XVI.

REPLY TO COUNTERCLAIM.

Order 21, r. 14.
Time for delivery.

ANY person, named in a defence as a party to a counterclaim, must deliver a reply (*a*) within eight days from the delivery of the defence and counterclaim, unless the time for doing so is enlarged (*b*). A third party, named as defendant to a counterclaim, cannot counterclaim against the party delivering it (*c*). It has been held, however, that the plaintiff may counterclaim by his reply in respect of matters arising after action brought (*d*).

Order 23, r. 4.
Allegations in counterclaim to be specifically denied.

In replying to the counterclaim, every allegation in it, which the party replying does not desire to admit, must be denied specifically, and without evasion, or must be stated to be not admitted, just as in the case of a defence (*e*), or it will be taken as admitted, unless the party replying is an infant, lunatic, or person of unsound mind. A simple joinder of issue on the defence and counterclaim will be construed as an admission of every

(*a*) For forms of reply to counterclaim, see App. No. 16c, 17c.

(*b*) The plaintiff's time for reply is consequently cut down, by the delivery of a counterclaim, from three weeks to eight days.

(*c*) *Street v. Gover*, 2 Q. B. D. 498.

(*d*) *Toke v. Andrews*, 8 Q. B. D. 428.

(*e*) *Ante*, p. 37.

allegation in the counterclaim (*f*); as will a general statement that the allegations contained in the counterclaim are not true (*g*); but as leave to amend will be granted almost as of course (*h*), the defendant should not go to trial on the admissions, but should apply by summons to have the reply struck out as embarrassing (*i*).

Where any ground of defence to the counterclaim arises after its delivery, it may be pleaded by the plaintiff (*k*) in his reply; or, if it arises after the delivery of his reply, or, when the time for its delivery has expired, a reply, or further reply, may be delivered, setting forth the new ground of defence, within eight days from the time it arose, or, at any subsequent time, by leave of the Court or the Judge.

Order 24, rr.
1, 2. Defence
to counter-
claim arising
after its
delivery.

(*f*) *Rolfe v. M'Laren*, 3 Ch. D.
106; *Benbow v. Low*, 13 Ch. D.
553.

(*g*) *Green v. Sevin*, 13 Ch. D.
589.

(*h*) *Tildesley v. Harper*, 10 Ch.

D. 393.

(*i*) *Benbow v. Low*, *supra*.

(*k*) Persons joined with the
plaintiff as defendants to a coun-
terclaim are not included in the
benefit of this rule.

CHAPTER XVII.

REJOINDER.

Order 23, rr.
2, 3.
Joinder of
issue.

WHERE the plaintiff, or any other party to a counter-claim, has delivered a reply to the counterclaim, or where the plaintiff, in his reply to the statement of defence, has not merely joined issue, but has pleaded fresh matter, or pleaded in confession and avoidance (a), the defendant may deliver a rejoinder, within four days from the delivery of the reply, unless the time is enlarged, joining issue on the reply, which joinder of issue will operate as a denial of every material allegation contained in the reply, except those which are expressly admitted or excepted from its operation (b).

Order 23, r. 2.
Only joinder
of i-sue
pleaded after
reply.

Except by leave of the Court, no pleading, other than a simple joinder of issue, can be delivered after the delivery of the plaintiff's reply.

(a) *Earp v. Henderson*, 3 Ch. D. 254.

(b) For form of rejoinder, see App. No. 16d. Having regard to the provisions of Order 27,

r. 13, there would seem to be no object in delivering a rejoinder, unless it is desired to make admissions.

CHAPTER XVIII.

CLOSE OF PLEADINGS.

WHEN any party to the action has simply joined issue on any pleading, the pleadings will be deemed to be closed, as between the party joining issue and the party on whose pleading issue is joined.

Order 23, r. 5.
By simple
joinder of
issue.

If the plaintiff fails to deliver a reply, or any other party fails to deliver any subsequent pleading, within the time limited for so doing, the pleadings will, thereupon, be deemed to be closed, as between the parties making default in pleading and the party to whose pleading he fails to plead; and the allegations contained in the pleading last delivered will be deemed to have been denied and put in issue (a).

Order 27, r. 13.
By default in
delivering
reply or
subsequent
pleading.

(a) Under the old rule the allegations in the last pleading delivered were taken as admitted.

CHAPTER XIX.

DISCONTINUANCE.

Order 26, r. 1. THE plaintiff, before delivery of the statement of defence, or after its delivery, but before taking any other proceedings in the action, except interlocutory applications, may, by notice in writing, discontinue his action altogether, or withdraw any part of his claim, without leave; and the defendant may tax, enter judgment for, and recover his costs of the action, or of the matter withdrawn, where the action is not altogether discontinued, if not paid within four days from taxation; discontinuance or withdrawal will not, under such circumstances, be a defence to a subsequent action for the same purpose. The costs of all work done reasonably, and not prematurely, with reference to affidavits or pleadings, by the other side before discontinuance, will be allowed (a). Where an injunction has been granted on an interlocutory application, and the plaintiff has given an undertaking as to damages, he will not, by discontinuing his action, be absolved from liability (b). So long as the notice to discontinue is in writing its form is immaterial (c).

r. 3. Defendant may sign judgment for costs.

Discontinuance or withdrawal no defence to fresh action.

(a) *Harrison v. Lentner*, 44 L. T.

331.

(b) *Newcomen v. Coulson*, 7 Ch.

D. 764.

(c) *The Pommerania*, 48 L. J.

P. D. 55.

The plaintiff, if desirous of discontinuing the whole, or withdrawing a part, of his action after he has taken any proceedings, other than interlocutory applications, subsequent to the delivery of the defence, and the defendant, if desirous at any time of withdrawing, or striking out, the whole, or part, of his defence or counterclaim, must apply to the Court, or the Judge, for leave to do so. The application may be made before, or at, or even after, the trial, and leave may be granted on such terms as to costs, and as to the bringing of other actions, as the Court or Judge may think fit (*d*). No appeal will lie from the Judge's order as to costs (*e*). An action may be discontinued pending appeal, and the appeal becomes thereupon *ipso facto* vacated (*f*). After reference to and findings by an arbitrator leave to discontinue will not be granted (*g*). On an application by defendant to withdraw his defence, the terms on which he seeks to withdraw should be stated in the summons (*h*).

Order 26, r. 1.
Discon-
tinuance or
withdrawal
by leave.

Withdrawal
of defence or
counterclaim.

The defendant may proceed with his counterclaim notwithstanding the fact that the plaintiff has discontinued his action.

Order 21, r. 16.
Counterclaim.

Where a subsequent action for substantially the same relief is brought before the costs of the discontinued action have been paid, it may be stayed

Order 26, r. 4.
Stay of second
action.

(*d*) As to the apportionment of costs on withdrawal of the defence of one only of several defendants, see *Real & Personal Advance Co. v. McCarthy*, 18 Ch. D. 362.

(*e*) *Perkins v. Beresford*, 47 L.T. 515.

(*f*) *Conybeare v. Lewis*, 13 Ch. D. 469.

(*g*) *Stahlschmidt v. Walford*, 4 Q. B. D. 217.

(*h*) *Real & Personal Advance Co. v. McCarthy*, 14 Ch. D. 188.

by order of the Court or Judge till such costs have been paid.

Order 26, r. 2. A cause which has been entered for trial may be
Withdrawal after entry for trial. withdrawn by consent, on production to the Registrar
of a written consent signed by all the parties.

CHAPTER XX.

PROCEEDINGS IN LIEU OF DEMURRER.

DEMURRERS are no longer allowed, but any party may raise any point of law by his pleading, and the point so raised will be disposed of by the Judge who tries the action, either at or after the trial, or the point of law may be set down for hearing and disposed of at any time before the trial by consent of the parties, or by order of the Court or Judge, on the application of any of the parties (a).

Order 25, rr.
1, 2.
Demurrers
abolished.

Where the decision of the point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply, the Court or Judge may thereupon dismiss the action, or make such other order thereon as may be just.

Order 25, r. 3.
Dismissing
action.

Where any pleading discloses no reasonable cause of action or answer, the Court or Judge may order it to be struck out, or in such case, or in case the action or defence shown by the pleadings is frivolous or vexatious, the Court, or the Judge, may order the action to be

Order 25, r. 4.
Groundless
claim or
defence.

(a) The substituted mode of answer every purpose of the old procedure seems calculated to demurmer.

stayed or dismissed, and judgment to be entered accordingly (b).

Order 25, r. 5.
Declaratory
decree.

No action will be open to objection on the ground that a merely declaratory judgment or order is sought, but the Court may make binding declarations of right, whether any consequential relief is claimed or not.

(b) The power to stay or dis- is new.
miss frivolous or vexatious actions

CHAPTER XXI.

AMENDMENT BY ALTERATION OF PARTIES.

IF the action has been commenced in the name of the wrong person as plaintiff, or if it is doubtful whether it has been commenced in the name of the right plaintiffs, the Court, or the Judge, if satisfied that the misjoinder has been occasioned by a *bond fide* mistake (either of law or fact (*a*)), may order the substitution, or addition, of other persons as plaintiffs, on such terms as seem just. Thus, in a suit instituted by a shareholder, on behalf of himself and the other shareholders, against the solicitors of the company, the Court ordered the company to be joined as co-plaintiffs, they having, by a mistake in law, been wrongly made defendants instead of plaintiffs (*b*). Where, however, persons entitled only to future contingent interests under a will, and, so, not entitled to sue in respect of the testator's estate, commenced an action for administration, it was held that this was not a *bond fide* mistake, and leave to add a person having a present interest, as plaintiff, was refused (*c*). If there is any doubt whether the

Order 16, r. 2.
Action commenced by
wrong
plaintiff.

(*a*) *Duckett v. Gover*, 6 Ch. D. 82; *Val de Travers Paving Co. v. London Tramways Co.*, W. N. 79, p. 46; 40 L. T. 133.
(*b*) *Duckett v. Gover*, *supra*.
(*c*) *Clowes v. Hilliard*, 4 Ch. D. 413.

original plaintiff ought to be plaintiff or defendant, he will, on the addition of other persons as plaintiffs, be retained as plaintiff till the hearing, when, if there turns out to be a misjoinder, he can be ordered to be treated as a defendant (*d*). Where the plaintiff has become bankrupt, the trustee in bankruptcy will not be substituted as plaintiff (against the original plaintiff's will), but should be added as co-plaintiff under rule 11 (*e*).

Order 16, r. 11.
Adding and
striking out
parties.

The Court, or the Judge, may, at any stage of the action, either on the application of either party, or without being applied to, order the names of any persons improperly joined as plaintiffs or defendants to be struck out, or may order the names of any persons to be added who ought to be parties, or whose presence is necessary for the complete settlement of all questions involved in the action. An order to amend, by substituting a particular defendant as plaintiff, or otherwise to amend, as plaintiff may be advised, will not authorise him to strike out another defendant altogether, even though the interest of such other defendant may have ceased (*f*). A person improperly joined as defendant may be struck out on his own application, notwithstanding that he has delivered a defence, but the order in such a case will be made without costs (*g*). A defendant will not be struck out against the plaintiff's wish, unless it is clear beyond doubt that he is an

Striking out
parties.

(*d*) *Tildesley v. Harper*, 3 Ch. D. 277. 436.

(*e*) *Emden v. Carte*, 17 Ch. D. 169.

(*f*) *Wymer v. Dodds*, 11 Ch. D.

(*g*) *Vallance v. Birmingham and Midland Land Investment Co.*, 2 Ch. D. 369.

unnecessary party (*h*). The plaintiff will be allowed to add any person as defendant whom he might fairly have joined as defendant originally (*i*), even where he only claims against him in the alternative (*k*). It would seem that parties may be added after judgment for administration and issue of the Chief Clerk's certificate, if they appear on the application to join them and consent (*l*); but an order adding defendants cannot be made after final judgment (*m*); nor, where judgment has been given against a defendant who is afterwards found to have no title, can the person actually entitled be substituted as defendant (*n*). Where the plaintiff has no right of action, leave will not be granted him to add, as plaintiffs, the persons in whom the right of action lies (*o*). Orders adding plaintiffs must secure them against costs, unless evidence of the consent of such proposed plaintiffs is produced (*p*). Where the plaintiff has become bankrupt, leave will be given to add the trustee in bankruptcy as co-plaintiff (*q*); but where a sole defendant becomes bankrupt, the plaintiff will not, in the case of a mere money demand, be allowed to add the

(*h*) *Anon*, W. N. 75, p. 208.

(*i*) *Edwards v. Louthier*, 24 W. R. 434; 45 L. J. C. P. 417. For form of order, see *Londonderry v. Rhosnydol Lead Mining Co.*, W. N. 79, p. 136.

(*k*) *Child v. Stenning*, 5 Ch. D. 695; *Honduras Oceanic Co. v. Lefevre*, 2 Ex. D. 301.

(*l*) *Turner v. Mason*, W. N. 83, pp. 134, 147.

(*m*) *Att.-Gen. v. Council of Birmingham*, 15 Ch. D. 423.

(*n*) *Lancaster Banking Co. v. Cooper*, 9 Ch. D. 594.

(*o*) *New Westminster Brewery Co. v. Hannah*, W. N. 76, p. 215; 24 W. R. 899; s. c. W. N. 77, p. 35; *Clowes v. Hilliard*, 4 Ch. D. 413; but see *Long v. Crossley*, 13 Ch. D. 388; *Ruston v. Tobin*, W. N. 80, p. 19; 49 L. J. Ch. 262.

(*p*) *Turquand v. Fearon*, 4 Q. B. D. 280; and see *Val de Travers Co. v. London Tramways Co.*, 40 L. T. 133.

(*q*) *Jackson v. North Eastern Railway Co.*, 5 Ch. D. 844; *Emden v. Carte*, 17 Ch. D. 169.

Adding
parties.

trustee in bankruptcy as defendant, but must prove his claim in the bankruptcy (*r*). Where one person sues on behalf of a number of persons with the same interest, they will not be added as co-plaintiffs, merely to give the defendant additional security for his costs (*s*). A defendant will not be added against the wish of the plaintiff, unless he is clearly a necessary party (*t*).

Order 16, rr. 11, 20.
Plaintiff or next friend not added without consent.

No person can be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under disability, without his own consent in writing, which consent must be filed in the Central Office, or in the District Registry if the action is proceeding there.

Order 16, r. 12.
Time for application to alter parties.

Applications to add, or strike out, or substitute, parties may be made by motion or summons at any time before the trial, or may be made upon the trial of the action in a summary manner. The application should be made at the earliest opportunity (*u*), and should be made by summons, not by motion (*x*). Where an application is successfully made at the trial to add plaintiffs, in ordinary cases the trial will be adjourned; but, under special circumstances, where the objection is not taken till the trial has been proceeded with some days, it will be allowed to proceed (*y*). No order can be made *ex parte* (*z*).

(*r*) *Barter v. Debeux*, 7 Q. B. D. 413; but see and consider *Hale v. Boustead*, 8 Q. B. D. 453.

(*s*) *De Hart v. Stevenson*, 1 Q. B. D. 313.

(*t*) *Norris v. Beasley*, 2 C. P. D. 80; *Harry v. Davey*, 2 Ch. D. 721.

(*u*) *Sheehan v. Gt. Eastern Ry.*

Co., 16 Ch. D. 59.

(*x*) *Wilson v. Church*, 9 Ch. D. 558.

(*y*) *Ruston v. Tobin*, W. N. 80, p. 19; 49 L. J. Ch. 262.

(*z*) *Tildesley v. Harper*, 3 Ch. D. 277; and see *Wilson v. Church*, *supra*.

On the addition or substitution of a defendant, the plaintiff, unless otherwise ordered, must issue a new writ of summons, and file an amended copy of the writ, and must serve the new defendant with the new writ, or with notice in lieu of service, in the same way as if he were an original defendant (*a*); and the proceedings as against the new defendant will be deemed to have begun only on the service of such writ or notice (*b*). Where the new defendant is out of the jurisdiction, the writ must be amended by adding an endorsement in the form prescribed in cases of writs for service out of the jurisdiction (*c*). Where several actions have been consolidated, it is not necessary, on the addition of defendants, to issue, or serve, a new writ (*d*).

Order 16, r. 13.
New writ on
addition of
defendant.

r. 11. To
date from
service.

(*a*) As to issue and service of the writ, see *ante*, Chap. I., II.

(*b*) This provision as to the proceedings dating from service is new.

(*c*) *Keate v. Phillips*, W. N. 78, p. 186.

(*d*) *Culley v. Wortley*, 4 Ch. D. 180.

CHAPTER XXII.

AMENDMENT OF PLEADINGS.

Order 20, r. 4. **WHENEVER** a statement of claim is delivered, the
Endorsement
of claim. plaintiff may alter, modify, or extend his claim without
amending the endorsement of claim on the writ (a).

Order 28, rr.
2, 13. The plaintiff may, at his own cost, amend his state-
By plaintiff
before deliver-
ing reply. ment of claim once, without leave, before the time limited
for delivering his reply has expired, and before its deli-
very, or within four weeks from the date of the last
defendant's appearance, should no defence have been
delivered. Where, by the amendment, the plaintiff aban-
dons the relief originally asked, and makes an entirely
new case, he may be ordered, on the defendant's applica-
tion, to pay the costs up to the date of amendment, and
the action may be stayed till such costs are paid (b).

Order 28, rr.
3, 13. A defendant may, at his own cost, amend his counter-
Of counter-
claim before
pleading to
reply. claim, without leave, at any time before the expiration
of the time allowed him for answering the reply, and
before such answer, or within twenty-eight days from
the delivery of his defence, if no reply is delivered.

(a) The rule, which is new, fol-
lows the decision in *Large v.*
Large, W. N. 77, p. 198.

(b) *Blackmore v. Edwards*, W.
N. 79, p. 175.

The Court, or the Judge, may, at any time, and on such terms as seem just, amend any defect or error in any proceedings, and all amendments necessary for determining the real question may be made.

Order 28, r. 12.
General
amendments.

The endorsement of claim or pleadings may be amended at any stage of the action by leave of the Court, or the Judge. An application for leave to amend need not, except under special circumstances, be supported by an affidavit (c). Leave may be given to the plaintiff to amend his statement of claim so as to raise an entirely new case, and the trial may be adjourned to enable the defendant to meet it, after the evidence is complete (d), or even at the hearing (e), unless the amendment would materially affect the nature of the case (f), or upon further consideration after verdict by jury (g). In like manner leave may be given to the defendant at the hearing to amend, and the case may be adjourned for that purpose (h); but the defendant will not be allowed to raise new issues by amendment which do not affect the rights of the parties but only the question of costs (i). Leave to amend ought not to be refused unless the party applying is acting *malâ fide*, or has,

Order 28, rr.
1, 6.
Amendment
by leave at
any time.

Leave to
amend at trial.

(c) *Conybeare v. Lewis*, W. N. 81, p. 31; 29 W. R. 391; but see *Cargill v. Bower*, 4 Ch. D. 78; *Chesterfield Co. v. Black*, W. N. 77, p. 65; 25 W. R. 409.

(d) *Roe v. Davis*, 2 Ch. D. 729.

(e) *Budding v. Murdoch*, 1 Ch. D. 42; *King v. Corke*, 1 Ch. D. 57; *Moseley v. Cowie*, 47 L. J. Ch. 271; *Dallinger v. St. Albyn*, 41 L. T. 406; *Betts v. Doughty*, 5 P. D. 26; *Nobels Explosives Co. v. Jones & Co.*, 17 Ch. D. 721.

(f) *Newby v. Sharpe*, 8 Ch. D. 39, 49; *Cargill v. Bower*, 47 L. J. Ch. 649; *Blenkhorn v. Penrose*, 43 L. T. 668; *Re St. Nazaire Co.*, 12 Ch. D. 92; *Clarke v. Yorke*, 31 W. R. 62.

(g) *Noad v. Murrow*, 40 L. T. 100.

(h) *De Bergue v. De Bergue*, W. N. 80, p. 191.

(i) *Webber v. Wedgwood*, W. N. 83, pp. 8, 27.

by his blunder, injured his opponent so as to render compensation, by costs or otherwise, impossible (*j*). The Court of Appeal will be chary in interfering with the discretion of the Court below as to amendment (*k*); but will do so where leave ought clearly to have been given in the Court below (*l*). An action may, by leave of the Court and with the sanction of the Attorney General, be turned into an information by amendment (*m*). Where leave to amend at the trial is refused, the refusal is part of the judgment, and an appeal from such refusal will be open on an appeal from the judgment, and a separate appeal is unnecessary and improper (*n*).

Order 19, r. 27.
Scandalous,
irrelevant, or
embarrassing
pleadings.

The Court, or the Judge, may, at any stage of the action, order any matter in the endorsement of claim or pleadings to be struck out, which is unnecessary or scandalous, or likely to prejudice, embarrass, or delay, the fair trial of the action. A statement of claim which is scandalous (*o*), unintelligible, and irrelevant (*p*), or which states evidence instead of facts and is unduly prolix (*q*), or which states conclusions of law without facts (*r*), may be struck out altogether, leave being reserved to the plaintiff to

(*j*) *Tildesley v. Harper*, 10 Ch. D. 393, which may be taken as having overruled the decision of Fry, J., in *Byrd v. Nunn*, 5 Ch. D. 781; *Collette v. Goode*, 7 Ch. D. 842.

(*k*) *Byrd v. Nunn*, 7 Ch. D. 284; and see *Stone v. City & County Bank*, 3 C. P. D. 306.

(*l*) *Tildesley v. Harper*, 10 Ch. D. 393.

(*m*) *Caldwell v. Pagham Har-*

bour Reclamation Co., 2 Ch. D. 221.

(*n*) *Laird v. Briggs*, 16 Ch. D. 663.

(*o*) *Coyle v. Cuming*, 27 W. R. 529.

(*p*) *Cashin v. Craddock*, 3 Ch. D. 376.

(*q*) *Davy Bros. v. Garrett*, 7 Ch. D. 473.

(*r*) *Phillips v. Phillips*, 4 Q. B. D. 127.

deliver a new statement of claim ; and a reply offending in the same way will be struck out with leave to deliver a fresh one (*s*). Statements of law in a defence will be struck out as embarrassing (*t*) ; but no defence, which the defendant is entitled to make use of, will be struck out (*u*), nor will any part of a statement of claim be struck out on the ground that it raises an alternative claim for relief (*x*). The Court of Appeal will not, except in an extreme case, interfere with the discretion of the Judge below on the question of striking out pleadings (*y*), but, though refusing to interfere with the discretion of the Judge, they may mark their disapproval of the mode in which the discretion has been exercised, by giving no costs of the appeal (*z*). The costs of an application to strike out or amend the pleadings of the opposite party will follow the result, but if the application is by motion, only the amount of costs which would have been incurred on summons will be allowed (*a*).

The Court, or the Judge, may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer (*b*). Order 25, r. 4.
Groundless
pleadings.

When any party has amended his pleading without leave, the opposite party may, within eight days from the delivery of the amended pleading, apply to the Order 28, r. 4.
Order
disallowing
amendment.

(*s*) *Williamson v. L. & N. W. Ry. Co.*, 12 Ch. D. 787.

(*t*) *Stokes v. Grant*, 4 C. P. D. 25.

(*u*) *Heugh v. Chamberlain*, W. N. 77, p. 128; 25 W. R. 742; *Heap v. Marriis*, 2 Q. B. D. 630.

(*x*) *Bagot v. Easton*, 7 Ch. D. 1.

(*y*) *Golding v. Wharton Salt*

Works Co., 1 Q. B. D. 374; *Byrd v. Nunn*, 7 Ch. D. 284.

(*z*) *Watson v. Rodwell*, 3 Ch. D. 380; but see *Davy Bros. v. Garrett*, 7 Ch. D. 473.

(*a*) *Marriott v. Marriott*, W. N. 78, p. 57; 26 W. R. 416.

(*b*) This rule is new.

Court or the Judge in Chambers to disallow the amendment, and the Court or Judge may, if it seems fit, disallow it, or allow it on such terms, as to costs and otherwise, as seem just.

Order 28, r. 5.
Amendment
gives no right
to opposite
party to
amend with-
out leave.

When any party has amended his pleading without leave, the opposite party may plead to the amended pleading or amend his pleading within the time he then has to plead, or within eight days from the delivery of the amendment, whichever time last expires, and if he has already pleaded and does not plead again or amend within the time prescribed, he will be deemed to rely on his original pleading in answer to such amendment (c).

Order 28, rr.
7, 10.
Time for
amendment.

Any party obtaining an order for leave to amend must amend his endorsement of claim or pleading, and deliver it to the opposite party, within the time specified in the order, or, if no time is specified, within fourteen days from the date of the order; if he fails to do so, the order will, at the expiration of that period, become *ipso facto* void, unless the time is enlarged.

Order 28, r. 8.
Amendments
beyond
certain length
to be printed.

If the amendments require the insertion of more than 144 words in one place, or are so numerous or of such a nature that the pleading would be difficult to read if they were made in writing, the amended pleading must be printed, otherwise the amendments may be made by written alterations, and, if necessary, by interleaved additions.

Order 28, r. 9. All amended pleadings must be marked with the

(c) This rule is new. Under the old rule leave to plead to amended pleadings was necessary.

date of the order to amend, if any, and also with the Date of order,
and amend-
ment.
day on which the amendment was made.

Where the plaintiff is directed to pay the defendant Order 65, r. 31.
Costs of
amendments.
the costs of the cause, the costs occasioned to the
defendant by any amendment of the plaintiff's pleadings
will be deemed part of the defendant's costs in the
cause, unless the amendment was rendered necessary
by the defendant's default, and where the plaintiff has
obtained judgment with costs, the costs occasioned to
the defendant by any unnecessary amendment of the
plaintiff's pleadings will be deducted from the costs to
be paid by the defendant (*d*).

(*d*) This rule is new.

CHAPTER XXIII.

INTERROGATORIES.

Order 31, r. 26. ANY party desiring to interrogate the opposite party must, before delivering the interrogatories, pay into Court to a separate account in the action, called "Security for Costs Account," to abide further order, the sum of £5, and if the number of folios exceeds five, a further sum of 10s. for every additional folio (a).

Order 31, r. 26. The party interrogating must serve with the interrogatories a copy of the receipt for the above payment into Court, and the time for answering will only commence from the date of such service, and the party interrogated will be under no obligation to answer until payment has been made.

Order 31, r. 1. In actions where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust (b), the plaintiff, at any time after delivering his statement of claim, and the defendant, at or after the time of delivering his defence, may interrogate the opposite party without leave, but one party cannot interrogate another party twice without leave. A guardian

(a) This rule is new.

(b) This limitation of discovery

without leave to actions founded on fraud or breach of trust is new.

ad litem is not an opposite party, and cannot be interrogated (c).

In any cause or matter the plaintiff or defendant may, by leave of the Court or the Judge, interrogate any opposite party (d). A third party joined with plaintiff as defendant to a counterclaim is not an opposite party, and will not be allowed to interrogate the plaintiff (e). Order 31, r. 1.
Leave to
interrogate.

In deciding whether leave to interrogate is to be given, the Court or Judge will take into account any offer made, by the party sought to be interrogated, to deliver particulars, make admissions, or produce documents relating to the matters in question (f). Order 31, r. 2.
Offer to
deliver parti-
culars, &c.

In adjusting the costs of the action inquiry will be made, at the instance of any party, as to the propriety of delivering the interrogatories, and if in the opinion of the taxing officer, or the Court or Judge, and whether an inquiry has been applied for or not, such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned thereby must be paid, in any event, by the party in fault, and they will only be allowed as part of his costs where the discovery appears to the Judge at the trial, or to Order 31, rr.
3, 25.
Costs of
improper in-
terrogatories.

(c) *Ingram v. Little*, 11 Q. B. D. 251.

(d) The rule is silent as to the stage at which interrogatories can be delivered under this rule; the old rule provided that they might be delivered "at any stage of the action," and leave was given even after the action was set down if the delay could be explained: *London and Provincial Marine In-*

surance Co. v. Davies, 5 Ch. D. 775; *Ellis v. Ambler*, 25 W. R. 557. Leave was, however, refused to the defendant to interrogate before delivery of his defence: *Disney v. Longburne*, 2 Ch. D. 704.

(e) *Molloy v. Kilby*, 15 Ch. D. 162.

(f) This rule is new; as to admissions, see *post*, p. 106.

the taxing officer if there is no trial, to] have been reasonably asked for (*g*).

Order 31, r. 5.
Corporations
and companies
interrogated
through
officer.

Where a corporation, company, or other body of persons, entitled to sue or be sued in its own name, or in the name of an officer or other person, is a party to the action, the opposite party may obtain leave from the Judge in Chambers to interrogate any member or officer of such corporation, company, or other body of persons. The practice of making an officer of the corporation a party for discovery is thus abolished (*h*). The member or officer interrogated cannot insist on payment of his costs before filing his affidavit (*i*). A member of the company is only allowed to be interrogated where there is no officer who can answer (*k*). The Judge is not bound to consider the propriety of the interrogatories on the application for leave (*l*). If a corporation elects to answer by its chief clerk, who is also solicitor of the corporation, he cannot afterwards claim privilege (*m*). It seems doubtful whether the answer of a member or officer of the company can be read against the company (*n*).

Order 31, r. 6.
Objection to
answer taken
in affidavit.

Objections to answer interrogatories on the ground that they are scandalous, irrelevant, not *bona fide*, not material at that stage of the action, or on any other ground, may be taken in the affidavit in answer.

(*g*) It will be necessary, therefore, always to ask for the costs at the trial.

(*h*) *Wilson v. Church*, 9 Ch. D. 552.

(*i*) *Berkely v. Standard Discount Co.*, 13 Ch. D. 97.

(*k*) *Berkely v. Standard Dis-*

count Co., 13 Ch. D. 97.

(*l*) *Berkely v. Standard Discount Co.*, 9 Ch. D. 643.

(*m*) *Mayor of Swansea v. Quirk*, 5 C. P. D. 106.

(*n*) *Manchester Val de Travers Paving Co. v. Stagg*, W. N. 82, p. 127.

The fact that the information sought by the interrogatories is within the knowledge of the agents of the party interrogated, and not the party himself, will not justify a refusal to answer, as it is his duty to obtain the information from his agents (*o*). It has been held that there is nothing objectionable in interrogating for the purpose of obtaining admissions of the interrogating parties' case, notwithstanding a previous denial of such case in the pleadings (*p*). An objection that an answer "might tend to criminate" is sufficient, and it is not necessary to swear to a belief that it would do so (*q*). Interrogatories asking for detailed accounts, which must, in any event, be taken under the judgment, may be safely objected to (*r*), except in actions against executors, where the interrogatories are delivered with a view to obtaining payment of the assets into Court (*s*).

Interrogatories which are exhibited unreasonably or vexatiously may be set aside, or, if prolix, oppressive, unnecessary, or scandalous, may be struck out, on application by summons, within seven days from service of the interrogatories. It would seem that the unreasonable, or vexatious, nature of the interrogatories is referable to objections with regard to the time or stage at which the interrogatories are exhibited, and

Order 31, r. 7.
Striking out
on summons.

(*o*) *Bolckow v. Fisher*, 10 Q. B. D. 161; *Pavitt v. North Metropolitan Tramways Co.*, 48 L. T. 730; but see *Rasbigham v. Shropshire Union Railway and Canal Co.*, 48 L. T. 902.

(*p*) *Att.-Gen. v. Gaskell*, 20 Ch. D. 519. *See quere*, whether the party would not now be obliged to obtain the required admission

of his case under Order 32, r. 4, *post*, p. 106.

(*q*) *Lamb v. Munster*, 10 Q. B. D. 110.

(*r*) *Lyon v. Tweddell*, 13 Ch. D. 375; and see *Parker v. Wells*, 18 Ch. D. 477.

(*s*) *Alison v. Alison*, 44 L. T. 547.

objections of that nature (*t*). It was decided, under the original rule, that objections on the ground that an answer would tend to criminate must be taken by affidavit and not by summons (*u*). Where interrogatories are obviously improper, they may simply be left unanswered, without any application to strike them out being made, or any objection being taken in the affidavit (*x*).

Order 31, r. 8.
Time for
affidavit in
answer.

The answer to interrogatories must be given by affidavit (*y*), which affidavit must be filed within ten days from the delivery of the interrogatories, unless the time is extended. If exceeding ten folios, the affidavit, unless otherwise ordered, must be printed.

r. 9. To be
printed.

Order 31, r. 10.
Objections to
affidavit.

The affidavit in answer to interrogatories cannot be excepted to, but its sufficiency must be determined on motion or summons.

Order 31, r.
11. Order
to answer.

Where the party interrogated omits to answer, or where his answer is insufficient, the party interrogating him may apply to the Court, or the Judge, for an order requiring him to answer, or answer more fully, either by affidavit, or *viva voce* on examination, as the Court or Judge may direct. The application should not be made by motion, but by summons, which must specify the particular answers which are objected to (*z*). On appeal from an order refusing to order a

Application
should be by
summons.

(*t*) *Gay v. Labouchere*, 4 Q. B. D. 206.

(*u*) *Fisher v. Owen*, 8 Ch. D. 645.

(*x*) *Smith v. Berg*, 25 W. R. 603; *Church v. Perry*, 36 L. T. 513.

(*y*) For form of interrogatories and affidavit in answer, see App.

Nos. 21, 22.

(*z*) *Chesterfield and Boythorpe Colliery Co. v. Black*, W. N. 76, p. 204; 24 W. R. 783; *Allhusen v. Labouchere*, 3 Q. B. D. 654; *Anstey v. N. & S. Woolwich Subway Co.*, 11 Ch. D. 439; but see *Furber v. King*, W. N. 81, p. 59; 29 W. R. 536.

further answer to interrogatories, no objection to the answer will be allowed to be taken, which was not raised before the Judge below (a). An order directing a further answer on *vivâ voce* examination may direct that the costs of the application and of the examination shall be borne by the party examined in any event (b).

Where any party interrogated objects to answer any interrogatory, and it appears that the right to the discovery sought by the interrogatory depends on the determination of some question in dispute in the action, or if it appears desirable, for any other reason, to have any question in the action determined before the question as to the right to discovery is decided, the Court, or the Judge, may reserve the question of discovery till after the determination of the question in the action. Where the discovery sought is not relevant to the issue, an order compelling the party interrogated to answer will be refused (c). Where the title of the party seeking discovery is denied, discovery, which would only serve him if his title is established, will not, if oppressive to the opposite party, be ordered at once (d).

If an order to answer, or to answer more fully, is not complied with, the party obtaining the order may move to attach the party refusing to answer, or he may, if the party ordered to answer is plaintiff in the action,

Order 31, r. 20.
No order for discovery will be made where right to it depends on any issue in the action.

Order 31, r. 21.
Effect of non-compliance with order to answer.

- (a) *Church v. Perry*, 36 L. T. 513. 256; *Wood v. Anglo-Italian Bank*, 34 L. T. 255.
(b) *Vicary v. Great Northern Railway Co.*, 9 Q. B. D. 168. (d) *Parker v. Wells*, 18 Ch. D. 477.
(c) *Rowcliffe v. Leigh*, 6 Ch. D.

obtain an order dismissing the action for want of prosecution, or if the party ordered to answer is a defendant, he may obtain an order striking out his defence, and placing him in the same position as if he had not defended. It is not imperative on the Court to make an order dismissing the action, or striking out the defence (e), and it will only be made as a last resort (f), when the Court is satisfied that the party is endeavouring to avoid giving fair discovery (g). The order will be deemed sufficiently served on the party by service on his solicitor, for the purpose of a motion to attach him (h), unless he can show that he had no notice of it, in which case the solicitor may be attached.

rr. 22, 23.
Service of
order on soli-
citor sufficient.

Order 31, r. 24.
Not necessary
to put whole
affidavit in
evidence.

Any party to the action may use in evidence, at the trial, part of an affidavit in answer to his interrogatories, without putting in the rest of the affidavit, but if the Court, on looking at the affidavit, is of opinion that the part put in ought not, by reason of its connection with the rest, to be used alone, the rest of the affidavit may be ordered to be put in.

Order 31, r. 27.
Payment out
of security
for costs.

When the action is finally disposed of, the money paid into Court on delivery of the interrogatories, as security for costs (i), will be paid out to the party paying it in, or to his solicitor on his written authority, if he is allowed his costs; but if he is ordered to pay costs, it will become subject to a lien for such costs.

(e) *Hartley v. Owen*, W. N. 76, p. 193; 34 L. T. 752; and see *Kennedy v. Lyell*, W. N. 82, p. 137.

(f) *Twycroft v. Grant*, W. N. 75, p. 201; *Anon.*, *ibid.* 202.

(g) *Danvillier v. Myers*, W. N. 83, p. 58.

(h) *Dalston v. Nanson*, W. N. 78, p. 81; 26 W. R. 434.

(i) *Ante*, p. 84.

CHAPTER XXIV.

PRODUCTION OF DOCUMENTS.

ANY party desiring discovery of documents must, before applying for an order for such discovery, pay into Court to a separate account in the action, called "Security for Costs Account," to abide further order, the sum of £5, and any further sum which the Court or Judge may direct (a).

Any party to the action may, without filing an affidavit in support of his application (b), obtain, from the Court or the Judge, an order against any other party to the action, directing him to make discovery on oath of all documents, relating to any matter in question in the action, which are, or have been, in his possession, and also directing him to produce for inspection by the party obtaining the order such of the documents as he may not object to produce. Any document must be considered as within the rule which is likely to lead the party seeking its production to a train of inquiry advancing his own or damaging his adversary's case (c). The fact that a party to the action is only nominal

Order 31, r. 26.
Security for
costs.

Order 31, rr.
12, 14.
Order for pro-
duction of
documents on
summons.

(a) This rule is new.

(b) But see and consider *Johnson v. Smith*, 25 W. R. 539.

(c) *Compagnie Financière du Pacifique v. Peruvian Guano Co.*, 11 Q. B. D. 55, 63.

plaintiff will not absolve him from the necessity of giving discovery (*d*). The application should not be made by the plaintiff before delivering his statement of claim (*e*), or by the defendant before delivering his defence (*f*). There is no rule in Chancery actions, that the plaintiff cannot get discovery of documents before the statement of defence has been delivered (*g*). Pending an appeal, the application must be made to the Court of Appeal (*h*). Third parties joined under Order 16, r. 17, must give discovery of documents (*i*).

Order 31, rr. 12, 13.

Affidavit must specify documents which party objects to produce.

Privilege.

The person, against whom the order for production is made, must file an affidavit of documents (*k*), which must specify those documents, if any, which he objects to produce, and must state the grounds for so objecting. Where a plaintiff of unsound mind sues by a next friend, the defendant is entitled to an affidavit of documents by such next friend, or by some other person acquainted with the facts (*l*), but where the defendant is a lunatic, the plaintiff is not, it seems, entitled to such an affidavit from the committee (*m*). Where privilege is claimed in respect of any documents, it is sufficient if

(*d*) *Wilson v. Raffalovich*, 7 Q. B. D. 553.

(*e*) *Cashin v. Cradock*, 2 Ch. D. 140; *Anon.*, W. N. 76, p. 53; but see *Republic of Costa Rica v. Strousberg*, 11 Ch. D. 323; and see and consider *Phillips v. Phillips*, 4 Q. B. D. 131, 140.

(*f*) *Anon.*, W. N. 76, p. 53; *Egremont Burial Board v. Egremont Iron Ore Co.*, 14 Ch. D. 158; *Webster v. Whewall*, 15 Ch. D. 120; *Quilter v. Healey*, 23 Ch. D. 42.

(*g*) *Union Bank of London v. Manby*, 13 Ch. D. 239, where

Hancock v. Guerin, 4 Ex. D. 3, is questioned.

(*h*) *Re National Funds Assurance Co.*, W. N. 76, p. 192.

(*i*) *McAlister v. Bishop of Rochester*, 5 C. P. D. 194.

(*k*) For form of affidavit, see App. No. 23. The form prescribed must be followed strictly, especially where privilege is claimed. *Gardner v. Irvin*, 4 Ex. D. 49.

(*l*) *Higginson v. Hall*, 10 Ch. D. 235.

(*m*) *Vivian v. Little*, 11 Q. B. D. 370.

they are sufficiently identified in the affidavit to enable an order for their production, and the party seeking discovery is not entitled to be put in a position to test the truth of the affidavit by the description of the documents (*n*). Thus, where privilege is claimed in respect of letters, the party seeking discovery is not entitled to have the dates of the letters and such other particulars of the correspondence as will indirectly give discovery of its contents (*o*): in no case must letters, where very numerous, be set out in the affidavit; they must only be referred to by means of bundles, properly identified (*p*). So far as the affidavit of documents is concerned, there is, it seems, no distinction between actions for recovery of land and other actions (*q*). If the party obtaining the order for production considers that he is entitled to the production of any documents, production of which is refused by the affidavit, he may take out a summons for their production (*r*), or a summons to consider the sufficiency of the affidavit (*s*).

Validity of objection to be tried on summons.

No document which is privileged will be ordered to be produced, but, except on the ground of privilege, the Judge has no discretion to withhold production of any document which is relevant to the matters in question in the

Production only withheld on ground of privilege.

(*n*) *Taylor v. Batten*, 4 Q. B. D. 85; *Bewicke v. Graham*, 7 Q. B. D. 400; but see *Fortescue v. Fortescue*, 24 W. R. 945; *Wrentham v. Hagley*, 46 L. T. 741.

(*o*) *Gardner v. Irvin*, 4 Ex. D. 49; but see *Taylor v. Oliver*, 34 L. T. 902.

(*p*) *Walker v. Poole*, 21 Ch. D. 835.

(*q*) *New British Investment Co.*

v. Peed, 3 C. P. D. 196; *Lyell v. Kennedy*, 50 L. J. Ch. 385.

(*r*) *Anderson v. Bank of British Columbia*, 2 Ch. D. 644.

(*s*) *Rowcliffe v. Leigh*, 6 Ch. D. 256. The former course would, however, seem to be the proper one, where the question of privilege is to be tried: *Daniell's Ch. Pr.* 1679.

action (*t*). In order to obtain a further affidavit of documents, the party applying for it must show that there are strong reasons for suspecting that the first affidavit has not set out all documents which ought to be set out (*u*), but he can only show this from the affidavit itself, or from admissions in the pleadings, or from the documents referred to in the affidavit, no affidavit in contradiction of the affidavit of documents being permissible (*x*). Production of documents in the joint possession of a party to the action, and a stranger, will not be ordered (*y*).

Order 31, r. 20.
Where right
to production
depends on
determination
of issue.

If it appears that the right to the production of any document, of which production is resisted, depends on the determination of any question in dispute in the action, or if it appears desirable that any question in the action should, for any other cause, be determined before deciding as to the right to production, no order for production will be made, till the question on which the right depends has been determined (*z*).

Order 31, rr.
15, 16.
Notice to pro-
duce docu-
ment referred
to in pleadings
or affidavits.

Where reference to any documents is made by any party in his pleadings or affidavits, any other party to the action may, at any time before, or at, the hearing of the action, give him notice in writing to produce the documents referred to for inspection, and allow copies

(*t*) *Bustross v. White*, 1 Q. B. D. 423; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; and see generally as to privilege, *Morgan*, 517; and see *Westinghouse v. Midland Ry. Co.*, 48 L. T. 98, 562; *Wheeler v. Le Marchant*, 17 Ch. D. 675, where the question of privilege is fully discussed.

(*u*) *Welsh Steam Coal Collieries*

Co. v. Gaskell, 36 L. T. 352.

(*x*) *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556; *Att.-Gen. v. Emerson*, 10 Q. B. D. 191.

(*y*) *Kearsley v. Phillips*, 10 Q. B. D. 36.

(*z*) *Rowcliffe v. Leigh*, 6 Ch. D. 256; *Wood v. Anglo-Italian Bank*, 34 L. T. 255; *Vermink v. Edwards*, 29 W. R. 189.

of them to be taken, by the party giving the notice or his solicitor (a); and, on receipt of the notice to produce, the party receiving it must, within two days, if all the documents have been set forth by him in an affidavit of documents, or within four days if they have not all been so set forth, deliver a counter-notice fixing a time within three days for the inspection at the solicitor's office, or, in case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, of such of the documents as he does not object to produce, and stating which of them he objects to produce, and on what grounds (b). To bring any documents within the rule it is not necessary that they should be specifically mentioned in the pleadings or affidavits (c).

r. 17. Time for inspection of documents.

If notice to produce documents, which are unnecessary, is given, the costs thus occasioned must be borne by the party giving the notice.

Order 32, r. 9. Unnecessary notice to produce.

Any party, not complying with a notice to produce documents referred to in his pleadings or affidavits, will not be allowed to use the documents in evidence, unless he can justify his noncompliance on the ground that, he being a defendant, they relate only to his own title, or on any other sufficient grounds.

Order 31, r. 15. Effect of non-compliance with notice.

Any party giving notice under the last rule may, in case of non-compliance with the notice, or if inspection

Order 31, r. 18. Order to produce.

(a) For form of notice, see App. No. 24. The form of notice prescribed must be substantially followed, though the exact words need not be used. *Re Credit Co.*, 11 Ch.

D. 256.

(b) For form of notice, see App. No. 25.

(c) *Smith v. Harris*, 48 L. T. 869.

is offered elsewhere than at the solicitor's office, obtain from the Judge an order for inspection in such place and manner as the Judge thinks fit. Where any other place is named in the order for inspection than the office of the solicitor on the record, an undertaking will, it seems, be required to pay any extra costs occasioned by documents being inspected at the particular place (e). The application may be made by the defendant before delivery of his defence (f). It seems doubtful whether it is a sufficient ground for refusing production, that to do so would tend to criminate, however this may be, the objection, to have any weight, must be on oath (g).

Order 81, r. 18.
Application
for order to
produce.

If the documents, of which production is desired, are not referred to in the pleadings or affidavits of the party against whom discovery is sought, or disclosed in his affidavit of documents, the party applying for an order for production must file an affidavit in support of his application, showing what the documents are, and that he is entitled to inspect them, and also that they are in the possession or power of the party against whom the order is sought.

Order 81, r. 21.
Effect of dis-
obeying order
for production.

If an order for discovery or inspection of documents is not complied with, the party obtaining the order may either move to attach the party disobeying it, or he may apply for an order dismissing the action for want of prosecution, if the party disobeying the order is

(e) *Prestney v. Mayor of Colchester*, W. N. 83, pp. 41, 114; 31 W. R. 414, 757. 42, overruling *Webster v. Whewall*, 15 Ch. D. 120.
(f) *Quilter v. Healty*, 23 Ch. D. 108. (g) *Webb v. East*, 5 Ex. D. 23,

plaintiff, or striking out the defence, if he is defendant, and placing him in the same position as if he had not defended. It is not imperative on the Court to make an order dismissing the action or striking out the defence (*h*), and it will only be made as a last resort (*i*) where the Court is satisfied that the party is endeavouring to avoid giving fair discovery (*k*). The order for attachment will be made pending an appeal from the order for discovery, with a direction that it is not to be drawn up till the appeal has been heard (*l*). The rule applies to an order, after judgment for specific performance, for discovery and inspection of title deeds (*m*).

An order for discovery or production of documents will, for the purposes of a motion for attachment, be deemed sufficiently served on the party against whom it is made, if served on his solicitor, unless he can show that he had no notice of the order; in which case the solicitor will be liable for attachment for neglecting to give him notice.

Order 31, rr. 22, 23.
Order for production sufficiently served on party by service on solicitor.

The costs of discovery of documents will only be allowed to the party obtaining such discovery, where it appears to the Court or Judge at the trial, or if there has been no trial, to the Taxing Master, to have been reasonably asked for (*n*).

Order 31, r. 25.
Costs of discovery.

When the action is finally disposed of, the money

Order 31, r. 27.

(*h*) *Hartley v. Owen*, W. N. 76, p. 193; 34 L. T. 752; *Kennedy v. Lyell*, W. N. 82, p. 137.

(*i*) *Twycroft v. Grant*, W. N. 75, p. 201; *Anon*, *ibid.* 202.

(*k*) *Danvilliers v. Myers*, W. N. 83, p. 58.

(*l*) *Mellor v. Thompson*, W. N.

83, p. 128.

(*m*) *Joy v. Hadley*, 22 Ch. D. 571.

(*n*) This rule is new, and will render it necessary always to ask at the hearing for the costs of the discovery.

Payment out of security for costs. paid into Court, on applying for discovery of documents, as security for costs (o) will be paid out to the party paying it in, or to his solicitor on his written authority, if allowed his costs, but if he is ordered to pay costs it will become subject to a lien for such costs.

(o) *Ante*, p. 91.

CHAPTER XXV.

MOTIONS ON DEFAULT OF PLEADING.

If the plaintiff, being bound to deliver a statement of claim, fails to do so within the time limited (a), the defendant may apply to the Court, or to the Judge—an application in chambers being generally the more proper course (b), though there is no hard and fast rule (c)—for an order dismissing the action for want of prosecution; and the action may be dismissed with costs, or any other order may be made which seems just, if no statement of claim has been delivered before the application is heard. The order for dismissal will be no bar to a fresh action (d). If the plaintiff submits to pay the costs of the motion, time will be allowed him to take further proceedings (e); but if he fails to do so within the time limited by the order, the action will then be at an end, and the time cannot be again enlarged (f). If the plaintiff has become bankrupt, notice of a motion

Order 27, r. 1.
Default in
delivering
statement of
claim.

(a) As to the delivery of a statement of claim, see *ante*, p. 45.

(b) *Frearson v. Loe*, W. N. 77, p. 245; 26 W. R. 138.

(c) *Evelyn v. Evelyn*, 13 Ch. D. 138.

(d) *Re Orrell Colliery v. Fire Brick Co.*, 12 Ch. D. 681.

(e) *Higginbotham v. Aynsley*, 3 Ch. D. 288.

(f) *Whistler v. Hancock*, 3 Q. B. D. 83; *Wallis v. Hepburn*, 3 Q. B. D. 84; *King v. Davenport*, 4 Q. B. D. 402; but see *contra* *Burke v. Rooney*, 4 C. P. D. 226; *Carter v. Stubbs*, 6 Q. B. D. 116.

to dismiss must be served on the trustee in bankruptcy (*g*). If the plaintiff fails to deliver a reply to a defence and counterclaim within the time limited for so doing, the defendant should move, simultaneously, to dismiss the original action, and for judgment on his counterclaim (*h*).

Order 27, r. 11.
Default in
delivering
defence.

If the defendant fails to deliver a defence within the time allowed him for doing so, the plaintiff may set down the action on motion for judgment, and obtain such judgment as he is entitled to on his statement of claim (*i*). The fact that the defendant has not, on the delivery of an amended statement of claim, delivered a new or amended defence, will not entitle the plaintiff to move for judgment (*k*). The costs of any evidence filed on motions under this rule will be disallowed (*l*).

Order 29, r. 12.
Motion for
judgment
against one
of several
defendants.

If one of several defendants fails to deliver a defence, the plaintiff may, (if the cause of action is severable), either set down the action against him at once on motion for judgment, or wait till it is entered for trial, or set down on motion for judgment, against the other defendants; or he may wait till he is in a position to move against the other defendants on admission on the pleadings (*m*).

(*g*) *Wright v. Swindon, Marlborough & Andover Railway Co.*, 4 Ch. D. 164.

(*h*) *Aitken v. Dunbar*, 46 L. J. Ch. 489; *Lumsden v. Winter*, 8 Q. B. D. 650.

(*i*) This mode of proceeding on default of pleading applies to all actions, except actions for debt, liquidated demand, detention of goods, damages, or recovery of

land.

(*k*) *Boddy v. Wall*, 7 Ch. D. 164, and see *ante*, p. 82.

(*l*) *Perpetual Investment Building Society v. Gillespie*, W. N. 82, p. 4.

(*m*) *Bridson v. Smith*, W. N. 76, p. 103; 24 W. R. 392; *Parsons v. Harris*, 6 Ch. D. 694; and see as to motions on admissions in the pleadings, *post*, p. 103.

Where any issue arises in the action, between other parties than the plaintiff and defendant, and one of them makes default in delivering any pleading, the opposite party may apply to the Court for such judgment as he is entitled to on his pleadings, and such order may be made as will do justice between the parties.

Order 29, r. 14.
Other parties than plaintiff may move for judgment.

Two clear days notice of motion on default of pleadings must be given (n), but the action may be set down before notice is given (o).

Order 52, r. 5.
Notice of motion.

Motions for judgment on default of pleading should not be brought on as ordinary motions, but should be set down in the cause book and marked short, and the notice of motion should contain a statement of the intention to mark the motion short, so as to render a further notice to that effect unnecessary. If not marked short the motion for judgment will come into the general paper in its regular turn (p). The Court has power, however, to hear the motion for judgment on a motion day (q). If on the hearing of a motion for judgment marked short the defendant opposes the application, no judgment can be given on that hearing, but an early day will be fixed for hearing (r). The motion must be supported by a

Mode of setting down actions on motion for judgments.

(n) *Roupell v. Parsons*, W. N. 76, p. 61; 24 W. R. 269; *Parsons v. Harris*, 6 Ch. D. 694; *Dymond v. Croft*, 3 Ch. D. 512; but see *Williams v. Cardwell*, W. N. 77, p. 140; 25 W. R. 646, where notice of motion was dispensed with.

(o) *Gillott v. Kerr*, 24 W. R. 428; W. N. 76, p. 116; *Hall v.*

Snelling, 20 Sol. J. 312.

(p) Registrar's Notice, W. N. 77, p. 58 (Miscellaneous).

(q) *Bowen v. Bowen*, 24 W. R. 246; *Hall v. Snelling*, 20 Sol. J. 312; *Pearce v. Spickett*, W. N. 76, p. 109.

(r) *Meakin v. Sykes*, 24 W. R. 293.

certificate stating the non-delivery of the pleading which is in default (s).

Order 29, r. 15
Judgment by
default may
be set aside.

Judgment by default may be set aside on such terms as the Court or the Judge in Chambers may think fit (t).

(s) *Daniell's Forms*, p. 847.

(t) *Watt v. Barnett*, 3 Q. B. D.

183; *Williams v. Brisco*, 29 W. R.
713.

CHAPTER XXVI.

MOTIONS ON ADMISSIONS IN THE PLEADINGS.

ANY party may, at any stage of the action, where admissions of fact have been made, either on the pleadings or otherwise (*a*), apply to the Court or to the Judge (*b*) for such judgment or order as he may be entitled to on such admissions, without waiting for the determination of any other question between the parties. An order directing payment of trust funds into Court, and amounting to a full administration decree (*c*), or an order amounting to a full partnership (*d*), or partition (*e*) decree, may be thus obtained, and it is not necessary to specify under what rule the application is made (*f*). If the plaintiff is in a position to move for judgment on default of pleading against one defendant, and to move for an order on admissions against another defendant, he may set down the action

Order 32, r. 6.
Order on
admissions in
pleadings.

(*a*) The old rule applied to admissions in the pleadings only.

(*b*) Under the old rule the application could be made by motion only.

(*c*) *Rumsey v. Reade*, 1 Ch. D. 643; *Bennett v. Moore*, 1 Ch. D. 692; *Hetherington v. Longrigg*, 10 Ch. D. 162.

(*d*) *Turquand v. Wilson*, 1 Ch. D. 85.

(*e*) *Gilbert v. Smith*, 2 Ch. D. 686; *Parsons v. Harris*, 6 Ch. D. 694; *Burnell v. Burnell*, 11 Ch. D. 213.

(*f*) *Hetherington v. Longrigg*, *supra*.

on motion for judgment against the former, and give him notice of motion for judgment on the same motion day as that on which he intends to move against the latter (*g*). An order may be thus obtained against one defendant, without waiting for the determination of the case against the other defendants (*h*). If the question is one which would be better decided at the trial, or otherwise, the Court may refuse to dispose of it on motion (*i*). The fact that the plaintiff has joined issue and set down the action for trial, will not prevent his applying on admission under this rule (*k*). The plaintiff will not, by omitting to move for judgment under this rule, be estopped from relying on admissions in the defendant's pleadings at the hearing (*l*). A defendant may move to dismiss the action under this rule (*m*), and obtain judgment on his counterclaim (*n*). It would seem that the plaintiff may, under very special circumstances (*o*), move for payment into Court of the amount claimed by him, and admitted to be due by the defendant, notwithstanding that the defendant has counter-claimed (*p*).

Action need
not be set
down.

The action need not be set down, but if, on a motion for an order on admissions in the pleadings being made, it appears that there must be a discussion or

(*g*) *Bridson v. Smith*, W. N. 76, p. 103; 24 W. R. 392; *Parsons v. Harris*, 6 Ch. D. 694.

(*h*) *Jenkins v. Davies*, 1 Ch. D. 696.

(*i*) *Mellor v. Sidebotham*, 5 Ch. D. 342; *Gilbert v. Smith*, 2 Ch. D. 686, 689.

(*k*) *Brown v. Pearson*, 21 Ch. D. 716.

(*l*) *Tildesley v. Harper*, 7 Ch.

D. 403.

(*m*) *Pascoe v. Richards*, W. N. 81, p. 11; 29 W. R. 330; but see *Litton v. Litton*, 3 Ch. D. 793.

(*n*) *Lumsden v. Winter*, 8 Q. B. D. 650; *Caroli v. Hirst*, W. N. 83, p. 115; 48 L. T. 759.

(*o*) *Mersey Steamship Co. v. Shuttleworth*, 10 Q. B. D. 468.

(*p*) *Showell v. Bowron*, W. N. 83, p. 50.

argument, it will be ordered to go into the general paper, subject to an order for its being advanced (*q*).

The Court, or the Judge in Chambers, may direct any necessary inquiries or accounts to be taken or made at any stage of the action though there remains some relief sought for, or issue to be tried, which render it necessary that the action should still proceed in the ordinary manner. The rule will enable the addition, after judgment, of further accounts and inquiries on the footing of wilful default, where such default has been pleaded, and the charge not dismissed (*r*).

(*q*) Registrar's Notice, W. N. 77, p. 58 (Miscellaneous); and see *Gilbert v. Smith*, 2 Ch. D. 686.

(*r*) *Luke v. Tonkin*, 21 Ch. D. 757, and cases there cited.

CHAPTER XXVII.

ADMISSIONS.

Order 32, r. 4. ANY party may, at any time not later than nine days
 Notice to admit facts. before the day for trial specified in the notice of trial, give notice in writing (a) to any other party to admit any specific facts mentioned in the notice, and if such notice is not complied with, within six days from the time of service, or within such further time as the Court or Judge may allow, the costs of proving the facts specified in the notice must be paid by the party receiving the notice, whatever the result of the trial, unless the Court or Judge certifies at the trial or hearing that the refusal to admit was reasonable or otherwise orders at any time (b).

Order 32, r. 4. Any admission made in pursuance of the above
 Amendment. notice may be amended or withdrawn at any time by leave of the Court or the Judge in Chambers on such terms as are just, and is to be deemed as made only for the purposes of the particular cause or matter, and

(a) For form of notice, see Appendix No. 27; for form of admission, see Appendix No. 28.

(b) This rule is new; it is presumed that the refusal to admit will not be deemed unreasonable,

unless it can be shown that the party receiving the notice knew when he received it that the alleged facts were true, or could have ascertained their truth without difficulty.

is to be used only as an admission for the party giving the notice.

Any party to the action may give notice by his pleading or otherwise to any of the opposite parties that he admits the truth of the whole, or any part, of their case.

Order 32, r. 1.
Admission of the case of the other side by notice.

Any party to the action may give notice to any other party to admit any document, saving all just exceptions (c), and the party to whom the notice is given will, if he refuse or neglect to admit the documents specified in the notice, be liable for the costs of their proof, unless he can justify his refusal or neglect at the hearing; on the other hand, the omission of notice to admit documents will disentitle the party proving them to the costs of their proof, unless he can satisfy the taxing master that expense was saved by the omission to give notice to admit, and he will have to bear the costs occasioned by notice to admit any unnecessary documents.

Order 32, rr. 2, 9. Notice to admit documents.

Omission to give notice to admit.

The admission of any document will be sufficiently proved by an affidavit of the solicitor or his clerk of the due signature of the admissions.

Order 32, r. 7.
Admission of documents proved by affidavit.

(c) For form of notice, see App. No. 26.

CHAPTER XXVIII.

EVIDENCE.

Order 37, r. 1. EVIDENCE may be taken in the action either *vivd*
 Evidence *vivd*
voce or by
 affidavit. *voce* at the hearing, or by affidavit.

Order 37, r. 1. If any party desires the evidence to be taken by
 Evidence only affidavit, he must obtain the written consent of the
 taken by affi- solicitors of all parties to that course. A witness who
 davit by consent. has not been cross-examined on his affidavit will be
 allowed to supplement it, at the hearing, by *vivd voce*
 evidence (a). Where either party finds, after an agree-
 ment for affidavit evidence has been entered into, that
 any of his witnesses refuse to make affidavits, he should
 take out a summons to be relieved from the agreement,
 and the Court, at the option of the other party, will
 either permit the particular witness to be examined
vivd voce at the trial, or discharge the agreement
 altogether, and direct all the evidence to be taken *vivd*
voce (b).

Order 16, r. 21. The consent of the next friend, guardian, committee,
 Consent by
 next friend, or other person acting on behalf of any person under
 &c. disability as to the mode of taking evidence will, if

(a) *Glossop v. Heston and Isleworth Local Board*, W. N. 78, p. 72; 26 W. R. 433.

(b) *Warner v. Mosses*, 16 Ch. D. 100; but see *Winfield v. Shoolbred*, W. N. 80, p. 192.

given with the consent of the Court, or the Judge in Chambers, have the same effect as if such party were under no disability and had consented (c).

The plaintiff must, within fourteen days from the consent of the defendant to affidavit evidence being obtained, file his affidavits in the Central Office, or in the District Registry where the action is proceeding, and deliver a list of them to the defendant or his solicitor; and, upon the delivery of the plaintiff's list of affidavits, the defendant will have a similar time within which to file, and deliver a list of, his affidavits; and, on the delivery of the defendant's list of affidavits, the plaintiff must, within seven days from the expiration of the time allowed the defendant for filing his affidavits, file, and deliver to the defendant or his solicitor a list of his affidavits in reply, which affidavits must be confined to matters strictly in reply. They need not, however, be directed merely to cutting down the defendant's evidence, but may be confirmatory of the plaintiff's evidence in chief (d).

Order 38, rr. 10, 25.
Time for plaintiff's.

r. 26. Time for defendant's.

r. 27. Time for plaintiff's in reply.

The time allowed to any party for filing his affidavits may be varied by agreement between the parties, or may be enlarged on application to the Court or the Judge in Chambers.

Order 38, rr. 25, 26.
Time for filing varied.

Evidence on motion, petition, or summons, must be taken by affidavit; but an order may be obtained, on application to the Court or Judge, for the attend-

Order 38, r. 1.
On motion, petition, and summons.

(c) It was held under the old rules that a guardian *ad litem* could consent to affidavit evidence.

(d) *Peacock v. Harper*, 7 Ch. D.

648; but see *Gilbert v. Comedy Opera Co.*, W. N. 80, p. 198; 29 W. R. 169.

ance, for cross-examination, of the party making the affidavit (e).

Order 38, rr.
2, 7.
Form of
affidavit.

Affidavits must be entitled in the action (it being sufficient to give the name of the first plaintiff and defendant and state that there are others), drawn up in the first person, divided into consecutively numbered paragraphs, confined as far as possible to distinct portions of the subject, and written or printed bookwise, and the costs of any affidavit infringing this rule will be disallowed.

Order 38, rr.
8, 10.
Address of
deponent.

Affidavits must state the description and the place of abode of the deponent, and a note must be appended saying on whose behalf they are filed.

Order 38, r. 12.
Alterations in
affidavit to be
authenticated.

Interlineations, alterations, or erasures in any affidavit must be authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, by initials or the stamp of the office, or it cannot be read or made use of, except by special leave of the Court or a Judge.

Order 38, r. 13.
Illiterate
deponent.

In case of affidavits by illiterate or blind persons, the commissioner who takes the affidavit must certify in the jurat that the affidavit was read over to and understood by the deponent, and, in the absence of such a certificate, the affidavit cannot be used unless the Court or Judge is otherwise satisfied that it was so read over and understood.

Order 38, r.
11. Scandal.

Any scandalous matter in any affidavit may be struck out by order of the Court or Judge in Chambers, and the

(e) Unless otherwise ordered, place before an examiner: Daniell's
the cross-examination will take Ch. Pr.

costs of the application may be ordered to be paid as between solicitor and client.

Any affidavit sworn for the purpose of being used in any cause or matter may be received by the Court or Judge, notwithstanding any irregularity of form. Order 38, r. 14. Irregularity.

Affidavits must be confined to a statement of facts within the knowledge of the witness, except when used on motion, when statements of belief, and of the grounds for belief, will be admissible (*f*). If matters of hearsay or argument, or copies or extracts from documents, are unnecessarily introduced in any affidavit, the party filing it will be liable for the costs of the affidavit (*g*). An affidavit echoing the statement of claim will not, where the deponent has no personal knowledge of the matters deposed to, be allowed to be used at the hearing, nor will the costs of it be allowed (*h*). Order 38, r. 3. Affidavits confined to statements within knowledge of witness. Costs of improper affidavit.

If any party desires to cross-examine any of the witnesses of the opposite party on their affidavits, he must, within fourteen days from the expiration of the time limited for filing the plaintiff's affidavits in reply, unless the time is enlarged, serve notice in writing on the party by whom the affidavits are filed, requiring him to produce the witnesses for cross-examination on their affidavits in Court at the hearing; and the party required to produce the witnesses may compel their attendance, in the same way as he might compel the attendance of a witness for examination. Unless the witness is produced for cross-examination, his affi- Order 38, r. 28. Notice of cross-examination of witness on affidavit. r. 29. Compelling attendance. r. 28. Affidavit cannot be used unless

(*f*) But see and consider *Gilbert v. Endean*, 9 Ch. D. 269. p. 12.

(*g*) *Hirst v. Procter*, W. N. 82,

(*h*) *Anon.*, W. N. 76, p. 59.

ance, for cross-examination, of the party making the affidavit (e).

Order 38, rr.
2, 7.
Form of
affidavit.

Affidavits must be entitled in the action (it being sufficient to give the name of the first plaintiff and defendant and state that there are others), drawn up in the first person, divided into consecutively numbered paragraphs, confined as far as possible to distinct portions of the subject, and written or printed bookwise, and the costs of any affidavit infringing this rule will be disallowed.

Order 38, rr.
8, 10.
Address of
deponent.

Affidavits must state the description and the place of abode of the deponent, and a note must be appended saying on whose behalf they are filed.

Order 36, r. 12.
Alterations in
affidavit to be
authenticated.

Interlineations, alterations, or erasures in any affidavit must be authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, by initials or the stamp of the office, or it cannot be read or made use of, except by special leave of the Court or a Judge.

Order 38, r. 13.
Illiterate
deponent.

In case of affidavits by illiterate or blind persons, the commissioner who takes the affidavit must certify in the jurat that the affidavit was read over to and understood by the deponent, and, in the absence of such a certificate, the affidavit cannot be used unless the Court or Judge is otherwise satisfied that it was so read over and understood.

Order 38, r.
11. Scandal.

Any scandalous matter in any affidavit may be struck out by order of the Court or Judge in Chambers, and the

(e) Unless otherwise ordered, place before an examiner: Daniell's
the cross-examination will take Ch. Pr.

costs of the application may be ordered to be paid as between solicitor and client.

Any affidavit sworn for the purpose of being used in any cause or matter may be received by the Court or Judge, notwithstanding any irregularity of form. Order 38, r. 14. Irregularity.

Affidavits must be confined to a statement of facts within the knowledge of the witness, except when used on motion, when statements of belief, and of the grounds for belief, will be admissible (*f*). If matters of hearsay or argument, or copies or extracts from documents, are unnecessarily introduced in any affidavit, the party filing it will be liable for the costs of the affidavit (*g*). An affidavit echoing the statement of claim will not, where the deponent has no personal knowledge of the matters deposed to, be allowed to be used at the hearing, nor will the costs of it be allowed (*h*). Order 38, r. 3. Affidavits confined to statements within knowledge of witness. Costs of improper affidavit.

If any party desires to cross-examine any of the witnesses of the opposite party on their affidavits, he must, within fourteen days from the expiration of the time limited for filing the plaintiff's affidavits in reply, unless the time is enlarged, serve notice in writing on the party by whom the affidavits are filed, requiring him to produce the witnesses for cross-examination on their affidavits in Court at the hearing; and the party required to produce the witnesses may compel their attendance, in the same way as he might compel the attendance of a witness for examination. Unless the witness is produced for cross-examination, his affidavit cannot be used unless Order 38, r. 28. Notice of cross-examination of witness on affidavit. r. 29. Compelling attendance. r. 28. Affidavit cannot be used unless

(*f*) But see and consider *Gilbert v. Endean*, 9 Ch. D. 269. p. 12.

(*g*) *Hirst v. Procter*, W. N. 82,

(*h*) *Anon.*, W. N. 76, p. 59.

witness produced.

davit cannot be used as evidence, except by leave of the Court; the Court will not, however, order the affidavit to be taken off the file (*k*). An affidavit when once filed cannot be withdrawn so as to prevent cross-examination (*l*).

Order 38, r. 28. Costs of producing witness.

The costs of producing any witness for cross-examination must be borne, in the first instance, by the party producing him. The witness may refuse to give evidence till his expenses, and, (if a professional man), compensation for loss of time, have been paid (*m*).

Order 38, r. 38. Cross-examination.

The Court or Judge in Chambers may in all cases disallow any questions put in cross-examination which appear vexatious or irrelevant; and the Judge may refuse to allow any cross-examination at all when it is clearly only for the purpose of annoyance (*n*).

Order 38, r. 30. Affidavit must be printed.

Affidavits for use at the hearing must, when the evidence is taken by affidavit, be printed, but the Court has power to dispense with their being printed (*o*).

Order 37, r. 1. *Vivâ voce* evidence in absence of agreement to contrary.

Unless the parties agree to take the evidence by affidavit, it must be taken *vivâ voce* at the hearing, but leave may, nevertheless, be obtained from the Court or the Judge in Chambers to prove any particular fact by affidavit, or to read the affidavit of any witness at the hearing (*p*), or to examine any witness, whose attendance in Court, ought, for any reason, to be dispensed

(*k*) *Meyrick v. James*, W. N. 77, p. 120; 46 L. J. 579.

(*l*) *Re Quartz Hill Gold Mining Co.*, 51 L. J. Ch. 940.

(*m*) *Re Working Men's Mutual Society*, 21 Ch. D. 831; *Knight v. Gardner*, W. N. 83, p. 152; 31 W. R. 911.

(*n*) *Fenton v. Cumberlege*, W. N. 83, p. 116; *Raymond v. Tapson*, 22 Ch. D. 430.

(*o*) *Attorney-General v. Pagham Harbour Reclamation Co.*, W. N. 76, p. 94.

(*p*) But see *Blackburn Union v. Brooks*, 7 Ch. D. 68.

with, by interrogatories, or before a commissioner or examiner; if, however, the other party desires the witness to be produced for examination, and it appears that he can be produced, the Court or Judge has no power to authorise his evidence to be taken by affidavit. Even where the party on whose behalf the affidavit was filed, offers to produce the witness for cross-examination on his affidavit, the Court cannot allow the affidavit to be read, if the defendant desires *viva voce* examination (*q*). Leave to take the evidence of a witness abroad before a commissioner or special examiner will be refused, unless the application is made promptly and without delay (*r*), or unless there is an actual difficulty in procuring the witness's attendance in this country (*s*), or his life would be endangered (*t*).

The Court or the Judge in Chambers may order the examination of any witness on oath, either before the Court or Judge, or before an officer of the Court, or before any other person, and at any place, and may allow the depositions to be given in evidence on such terms as seem right. The Court has power to order depositions to be filed, though taken informally (*u*). Where a person who had stated what she could depose to subsequently refused to make an affidavit, she was ordered under this rule to attend in Court at the hearing

Order 37, r. 5.
Order for
examination
of witness.

(*q*) *Blackburn Union v. Brooks*, 7 Ch. D. 68.

(*r*) *Stewart v. Gladstone*, 7 Ch. D. 394.

(*s*) *The M. Mozham*, 1 P. D. 107—115; *Warner v. Mosses*, 16 Ch. D. 100; but see *Re Imperial Land Co. of Marseilles*, W. N. 77, p. 286, 244; *Spiller v. Paris Skating*

Rink Co., 27 W. R. 225; and *Banque Franco-Egyptienne v. Lutschner*, W. N. 79, p. 183; 28 W. R. 133.

(*t*) *Crofton v. Crofton*, 20 Ch. D. 760; and see *Berdan v. Greenwood*, *ibid.*, 764.

(*u*) *Bolton v. Bolton*, 2 Ch. D. 217.

of the action to be examined orally (x). It has, however, been held by Jessel, M.R., that the rule only applies to taking evidence *de bene esse*, and not to cases where the witnesses are able to attend in Court (y). As a general rule, witnesses *de bene esse* are not to be examined *ex parte* (z).

Order 37, r. 7.
Documents.

The Court or the Judge in Chambers may at any stage of the proceedings order any person to attend and produce any documents named in the order which he could be compelled to produce at the hearing or trial.

Order 37, r. 8.
Non-attendance of
witness.

Any person disobeying an order requiring his attendance as a witness, or to produce documents, will be deemed guilty of contempt of Court.

(x) *Winfield v. Shoolbred*, W.N. 100.
80, p. 192.

(z) *Ibid.*

(y) *Warner v. Mosses*, 16 Ch. D.

CHAPTER XXIX.

SUMMONS FOR DIRECTIONS.

ANY party to a cause or matter may at any time before trial take out one general summons for directions, returnable in not less than four days, with respect to particulars of claim, defence, or reply, statement of special case, discovery, examination of witnesses, mode or place of trial, and any other matter or proceeding in the cause or matter previous to trial (a).

Order 30, rr.
1, 2. Summons
for directions.

The party taking out the summons must include in it as many of the above-mentioned matters and proceedings as can be conveniently dealt with by the order or direction of the Court or Judge.

Order 30, r. 2.
Summons to
be compre-
hensive.

On the hearing of the summons, any party to whom it is addressed may apply for any order or directions as to any of the above matters or proceedings which he desires, and on such summons any order may be made, or directions given, whether applied for or not, which the Court or Judge may direct.

Order 30, r. 2.
Order on
summons.

Where any application is made as to any of the above matters or proceedings, which in the opinion of the Court or Judge ought to have been included in or made upon the general summons for directions, the application will only be granted at the costs of the applicant.

Order 30, r. 3.
Costs of sub-
sequent appli-
cation.

(a) This order is entirely new.

CHAPTER XXX.

NOTICE OF TRIAL.

Order 38, r. 30.
Order 36, rr.
11, 13.
Notice of
trial.

THE plaintiff, or any other person in the position of plaintiff, may, with his reply (if any), whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial (*a*), in case of *vivd voce* evidence, or on the close of the evidence, if taken by affidavit, give notice of trial of the action to the defendant, and must specify by his notice whether the action or only issues are to be tried (*b*).

Order 33, r. 1.
Preparation of
issues.

Where the issues of fact in dispute between the parties are not sufficiently defined by the pleadings, the Judge may direct the parties to prepare issues, to be afterwards settled by the Judge, if the parties differ (*c*), or may refer it to chambers at once to settle proper issues of fact (*d*).

Order 36, r. 12.
Order 38, r. 30
Omission by

If the plaintiff does not give notice of trial within six weeks from the close of the pleadings, or from the

(*a*) Under the old rule notice of trial could not be given where there were no pleadings.

(*b*) For form of notice, see App. No. 29. It will be observed that it is no longer open to either party to give notice of trial by jury or

before a referee.

(*c*) *West v. White*, 4 Ch. D. 631; *Clements v. Norris*, W. N. 77, p. 248; 26 W. R. 94; and see *Clarke v. Cookson*, 24 W. R. 535.

(*d*) *Powell v. Williams*, *supra*; *Petar v. Lailey*, W. N. 81, p. 22.

close of the evidence, if taken by affidavit, the defendant may, unless the time for giving notice for trial is enlarged, apply either to the Court, or to the Judge in Chambers (*e*), for an order dismissing the action for want of prosecution, or he may himself give notice of trial. Where there are other defendants, a defendant, to whose defence no reply has been delivered, should, before moving to dismiss, ascertain from the plaintiff how the action stands with regard to them (*f*). Where the pleadings are closed, not by joinder of issue, but by default in delivering a reply, either of the above steps are open to the defendant, should the plaintiff fail to give notice of trial within six weeks (*g*).

Notice of trial must be given ten days before trial, unless the opposite party agrees, or is under terms, or ordered, to accept short notice, in which case it need only be given four days before trial; when given, it will be deemed notice for trial on any day, after the expiration of the notice, on which the action can come on for trial; or, if the action is to be tried elsewhere than in Middlesex, which, as we have seen (*h*), it may be, if the plaintiff names any particular place in his statement of claim, notice of trial will be deemed to be for the first day of the next assizes at the place named.

Notice of trial may be countermanded by leave of the Court or the Judge in Chambers, on such terms, as

plaintiff to
give notice of
trial.

Order 36, rr.
14, 17, 18.
Ten days'
notice of trial.

(*e*) An application at chambers being generally the best mode: *Frearson v. Loe*, W. N. 77, p. 245; 26 W. R. 138.

(*f*) *Ambroise v. Evelyn*, 11 Ch. D. 759.

(*g*) *Litton v. Litton*, 3 Ch. D.

793; and see Registrar's Notice, W. N. 77, p. 153 (Miscellaneous), amending a prior notice, W. N. 77, p. 58 (Miscellaneous), which stated that notice of trial can only be given after joinder of issue.

(*h*) *Ante*, p. 46.

Order 36, r. 19.
Countermand-
ing notice of
trial.

to costs, and otherwise, as seem just, or it may be countermanded by consent.

Order 36, r. 16. If the action is to be tried in London or Middlesex,
Notice of and is not entered for trial within six days from notice
trial inopera- of trial, the notice will become inoperative.
tive by delay.

CHAPTER XXXI.

ENTRY FOR TRIAL.

WHERE the action or issues are to be tried in London or Middlesex, the party giving notice of trial may enter it for trial on the day on which he gives notice for trial, or within the next five days; if, however, he omits to do so on the day, or the day after, notice of trial is given, the opposite party may enter it for trial, at any time within the next four days, unless notice of trial has been countermanded. If the action is not entered for trial within six days from notice of trial, the notice will become inoperative (a).

Order 36, r. 20.
By party giving notice of trial;

by opposite party.

r. 16.
Notice of trial inoperative by delay.

Where the action is to be tried elsewhere than in London or Middlesex, either party may enter it for trial at any time before the day next before the commission day of the next assizes; but if entered by both parties, it will be tried in the order of the plaintiff's entry.

Order 36, r. 22. Trial elsewhere than in London or Middlesex.

The party entering the action for trial must deliver to the Registrar two copies of the pleadings in the action, for the use of the Judge at the trial, which

Order 36, r. 30. Delivery of pleadings for use of Judge.

(a) In calculating the six days, notice is given must be reckoned. it appears that the day on which

copies must, so far as the originals are required to be printed, be printed.

Order 26, r. 2.
Action may be
withdrawn
after entry by
consent.

The action may be withdrawn after being entered for trial, on producing to the Registrar a written consent signed by the parties.

CHAPTER XXXII.

MODE OF TRIAL.

The Court, or Judge in Chambers, may at any time order any cause or matter to be tried by a Judge and jury, or by a Judge and assessors, or by an Official or Special Referee, with or without assessors (a). Order 36, r. 7.
Order as to
mode of trial.

Causes or matters assigned by the Judicature Act to the Chancery Division must be tried by a Judge without a jury, unless otherwise ordered; but any other cause or matter will be ordered to be tried by a jury, on the application of any party, unless it requires a prolonged examination of documents or accounts, or any scientific or local investigation which the Court or Judge considers unsuitable for a jury, or unless the question or issue, whether of fact or law, arises in any cause or matter which could before the Judicature Act have been tried without a jury, and trial without a jury appears desirable, in which case an order for trial by jury may be refused (a). Order 36, rr.
3, 4, 5, 6.
Mode of trial.

(a) It will be observed that notice of trial by jury can no longer be given, but that an order must be obtained. The cases under the old rule seem, therefore, no longer any guide, as they proceeded on the assumption that each party had a *prima facie* right to jury trial in every case, and that the onus

was on the party applying for an order for trial without jury to show that the cases could not be conveniently tried in accordance with the notice: *Hunt v. Chambers*, 20 Ch. D. 365: now the onus would seem to be on the party asking for jury trial to show that it is the best tribunal.

Order 36, r. 8.
Order 34, r. 2.
Trial of different questions
in different
ways.

The Court, or the Judge, may, subject to the foregoing rules, at any time, or from time to time, order the trial of different questions of fact in different ways, or order one question to be tried before another, and may appoint the places for the different trials. An order for trial of one issue before another will not be made where the issues are complicated (*b*), or except on very special grounds (*c*); and, it would seem, is made less readily on the application of the plaintiff, than on the application of the defendant (*d*). An issue raised by counterclaim will not be ordered to be tried before the original issues raised (*e*). The order may be made in cases of mixed questions of law and fact (*f*). The discretion of the Court or Judge below as to the mode of trial will not be lightly interfered with by the Court of Appeal (*g*).

Order 34, r. 9.
Trial of issues
without
pleadings.

Where the parties to the action are agreed as to the questions of fact to be decided, they may, at any time after issue of the writ, and before judgment, by consent, and by order of the Court or Judge, proceed to trial of any question of fact without formal pleadings (*h*).

(*b*) *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918, 930.

(*c*) *Piercey v. Young*, 15 Ch. D. 475.

(*d*) *Emma Silver Mining Co. v. Grant*, *supra*, p. 928; and see *Dent v. Sovereign Life Assurance Co.*, W. N. 79, p. 33; 27 W. R. 379.

(*e*) *Piercey v. Young*, *supra*.

(*f*) *Tasmanian Main Line Ry. Co. v. Clark*, W. N. 79, p. 88, 106; 27 W. R. 677.

(*g*) *Swindell v. Birmingham Syndicate*, 3 Ch. D. 127; *Brooke v. Wigg*, 8 Ch. D. 510; *Muston v. Tobin*, 10 Ch. D. 558; *Hunt v. Chambers*, 20 Ch. D. 365.

(*h*) This rule is new.

CHAPTER XXXIII.

TRIAL OF THE ACTION.

TRIAL of the action will take place in Middlesex, Order 36, r. 1. Trial in Middlesex. unless otherwise ordered, or unless some other place for trial is named in the statement of claim, or, in the absence of a statement of claim, in a notice in writing served on the defendant within six days after his appearance (a).

If the defendant does not appear when the action is called on for trial, the plaintiff may prove his claim, so far as the burden of proof lies on him, and obtain judgment. Proof of service of notice of trial is not required (b). Order 36, r. 31. Default of appearance by plaintiff at trial.

If the plaintiff does not appear when the action is called on for trial, the defendant may obtain judgment dismissing the action, or, if he has delivered a counter-claim, he may prove his counterclaim, so far as the burden of proof lies on him, and obtain judgment against the plaintiff. There is no necessity for the defendant to prove service of notice of trial in such a Order 36, r. 32. Default of appearance by defendant at trial.

(a) The power to specify the place of trial by notice in writing is new.

(b) *Chorlton v. Dickie*, 13 Ch. D. 160, where Fry, J., declined to

follow his previous decision to the contrary in *Cockshott v. London General Cab Co.*, W. N. 77, p. 214; 26 W. R. 31.

case (c). Where the plaintiff has become bankrupt judgment cannot be thus obtained, unless proof of service of notice of trial on the trustee in bankruptcy is given (d).

Order 36, r.
33. Judgment obtained in absence of any party may be set aside.

Any party, in whose absence judgment has been obtained, may apply to the Court, within six days after the trial, for an order setting aside the judgment, and the order may be made on such terms as seem just; the application, in case of trial at the assizes, being made either at the assizes or in Middlesex. An order setting aside the judgment, and directing the action to be restored to the paper, will be made on payment of the costs of the day and of the application (e), and the order is almost a matter of course, where the default is owing to a slip (f). Where the plaintiff's absence at the trial is caused by the default of his solicitor, the time for applying to set aside the judgment will be enlarged (g). The rule applies to the trial of a special case (h).

Order 36, r.
34. Trial may be adjourned.

The trial may be postponed or adjourned, if expedient, for such time, and to such place, and on such terms, as the Judge thinks just. When the trial is adjourned, after the case is called on, to enable the plaintiff to add parties and amend, the plaintiff will be ordered to pay the defendant all costs actually in-

(c) *James v. Crow*, 7 Ch. D. 410; *Ex parte Lous*, 7 Ch. D. 160; *Robson v. Robson*, 22 Sol. J. 70.

(d) *Eldridge v. Burgess*, 7 Ch. D. 411.

(e) *Cockle v. Joyce*, 7 Ch. D. 56; *Wright v. Clifford*, W. N. 78, p. 88; 26 W. R. 369; *King v. Sandeman*, 26 W. R. 569; *Burgoine v.*

Taylor, 9 Ch. D. 1.

(f) *Burgoine v. Taylor*, *supra*.

(g) *Michel v. Wilson*, 25 W. R. 380; and see and consider *Atwood v. Chichester*, 3 Q. B. D. 722; *Davis v. Ballenden*, 46 L. T. 797.

(h) *Allum v. Dickinson*, 9 Q. B. D. 632.

curred by the action standing several days in the paper (i).

Upon the trial of the action, the Court may direct judgment to be entered for either party at, or after, the trial, or may adjourn the case for further consideration, or may leave the parties to move for judgment. This latter course is open to Judges of the Chancery Division (k).

(i) *Lydall v. Martinson*, 5 Ch. D. 780; *Dowdewell v. Dowdewell*, W. N. 77, p. 228. (k) *Krehl v. Burrell*, 10 Ch. D. 420.

Order 36, r. 39. Judgment at trial, or adjournment.

CHAPTER XXXIV.

TRIAL BEFORE REFEREE.

Order 36, r. 7. THE Court, or a Judge, may at any time order any cause, matter, or issue to be tried by an Official or Special Referee, with or without assessors (*a*). Where accounts and inquiries are directed to be taken before an Official Referee, the report should be in the same form as a chief clerk's certificate (*b*); in other cases the report is, it seems, equivalent to, and must take the form of, a special verdict (*c*). The Court of Appeal will not, ordinarily, interfere with the discretion of the Court below to make or refuse the order (*d*), but it has jurisdiction to do so (*e*).

Order 36, r. 45. Distribution of business among Official Referees. The business referred to the Official Referees is distributed among them in rotation by the Registrar's clerks, in the same way as business referred to the Conveyancing Counsel of the Court is distributed;

(*a*) Under the old rules it was held that the whole action could not be tried by an Official Referee, and subtle distinctions were drawn between references for report under s. 56 of the Judicature Act, 1873, and for trial under s. 57; see *Longman v. East*, 3 C. P. D. 142; the distinction now seems to be got rid of. It will be observed that

notice of trial before a Referee can no longer be given.

(*b*) *Burrard v. Calisher*, 30 W. R. 321.

(*c*) *Miller v. Pilling*, 9 Q. B. D. 736.

(*d*) *Saxby v. Gloucester Waggon Co.*, W. N. 80, p. 28.

(*e*) *Ormerod v. Todmorden Mill Co.*, 8 Q. B. D. 664.

but if the Court, or the Judge, directs a reference to any particular Official Referee, which may be done where expedient, regard will be had to such direction. The parties themselves are not entitled to require reference to any particular Official Referee (f).

The order directing the reference, or a duplicate of the order, must be produced to the Registrar's clerk, by whom it will be endorsed with a note specifying the name of the Official Referee to whom the question or issue is to be referred, and the order, when so endorsed, will be a sufficient authority to the Official Referee to proceed with the reference.

The Referee, unless otherwise ordered, may hold the trial wherever he deems most convenient, and have any inspection or view, either by himself, or with his assessors, if any, which he deems convenient. Unless otherwise directed, he must proceed with the trial *de die in diem*, but if the parties do not object, at the time, to this not being done, they cannot afterwards move to set aside the award on that account (g).

Trial before a Referee is conducted in the same way with regard to evidence, and the mode of enforcing the attendance of witnesses, and otherwise, as trials before Judges of the High Court, except that the tribunal of the Referee is not a public Court of Justice.

The Referee has the same authority with respect to discovery and production of documents and in the con-

r. 47. Reference to particular Official Referee.

Order 36, r. 46. Order to be endorsed with name of Referee.

Order 36, r. 48. Referee to hold trial where he pleases.

Order 36, r. 49. To be conducted like trial in High Court.

Order 36, rr. 50, 51. Referee to have

(f) *Lascelles v. Butt*, 2 Ch. D. 533, 592.

(g) *Robinson v. Robinson*, W. N. 76, p. 154 ; 24 W. R. 675.

authority of
Judge.

duct of the reference or trial, and the same power to direct judgment to be entered (*h*), as a Judge of the High Court, except that he cannot commit any one to prison, or enforce any order by attachment or otherwise.

Order 36, r.
52. Referee
may submit
question or
facts to Court.

The Referee may, during the trial, or by his report under a reference for report, submit any question for the decision of the Court, or state, specially, any facts for the Court to draw inferences from, and the order to be made on such a submission or statement will be entered as the Court may direct.

Order 36, r.
52. Court
may require
explanation,
or remit for
re-trial.

The Court may require the Referee to explain, or give the reasons for, his report, and may remit the cause or matter to him, or to any other Referee, for re-trial, or for further consideration, or may decide the question referred, on the evidence taken before the Referee, with such further additional evidence as the Court may require.

Order 35, r.
53. Notice
of report.

On completion of the report, the Referee must at once give notice of its completion by prepaid post letter to each of the parties to the trial or reference, directed to their address for service, and they will then be deemed to have notice of the report.

Order 36, r.
54. Motion
to vary.

Where a report has been made in any cause or matter in which further consideration has been adjourned, any party may, at the hearing or further consideration, without notice of motion or summons for that purpose, ask the Court or Judge to adopt the report, or may, without leave, give not less than four days'

(*h*) Under the old rules it was held that the Referee could not direct judgment to be entered or order production of documents.

notice of motion, (to come on with the hearing or further consideration), to vary the report, or to remit the whole or any part of the cause or matter for rehearing or further consideration to the same or any other Referee.

Where further consideration has not been adjourned, ^{Order 36, r. 55.} any party may give an eight days' notice of motion for the same purpose (i).

(i) The old rules did not specify to vary the report were to be the mode in which applications made.

CHAPTER XXXV.

MOTION FOR JUDGMENT.

Order 27, r. 11. On default of pleadings.
Order 32, r. 6. On admissions.

WHERE any defendant makes default in delivering a defence, the action may, as we have seen (*a*), be set down against him on motion for judgment. The plaintiff or defendant may also, as we have seen (*b*), move for judgment on admissions in the pleadings or otherwise, in which case, however, he need not set down the action, but may apply by motion in the ordinary way.

Order 40, r. 1. Where no other method provided.

Where judgment cannot be obtained in any other manner, it must be obtained by setting down the action on motion for judgment.

Order 40, r. 2. If judgment not given at trial.

Where the Judge or Referee abstains from directing judgment to be entered at the trial, the plaintiff may at once set down the action on motion for judgment, but if he fails to do so, and to give notice of motion to the other parties within ten days after trial, the action may be set down on motion for judgment by the defendant.

Order 40, r. 7. After trial of issues.

Where issues, or questions of fact, have been ordered to be tried, or determined, in any manner, the plaintiff

(*a*) *Ante*, p. 100.

(*b*) *Ante*, p. 103.

may, as soon as they have been tried or determined, set down the action on motion for judgment, but if he fails to do so, and to give notice of motion to the other parties within ten days after his right to set it down has arisen, the action may be set down on motion for judgment by the defendant.

Where some, only, of the issues or questions of fact ordered to be tried, or determined, in any manner have been so tried or determined, any party to the action may, if the result of their trial or determination renders the trial or determination of the remaining issues or questions of fact unnecessary, or renders the postponement of their trial or determination desirable, apply to the Court, or to the Judge in Chambers, for leave to set down the action at once on motion for judgment, and leave may be given, if expedient, and the trial or determination of the issues or the questions of fact still remaining untried or undetermined may be postponed, if desirable.

The Court may give final judgment on motion for judgment, or, if there are not sufficient materials before the Court to enable it to do so, may adjourn further consideration, and may direct any issues or questions to be tried or determined, and any accounts and inquiries to be taken and made which it thinks fit (c).

There must be two clear days' notice of motion for judgment, which notice of motion may be filed if the defendant has not appeared; but it would

Order 40, r. 8.
After trial of
some only of
several issues.

Order 40, r.
10. Final
judgment
on motion for
judgment, or
further con-
sideration
adjourned.

Order 52, r. 5.
Order 67, r. 4.
Notice of
motion.

(c) For form of order adjourning further consideration on motion for judgment, see *Bennett v. Moore*,

1 Ch. D. 692; *Gilbert v. Smith*, 2 Ch. D. 686, 689.

seem that the action may be set down before notice is given (*d*).

Order 40, r. 9.
Action to be
set down
within a
year.

No action can be set down on motion for judgment more than a year from the time when the party seeking to set it down became first entitled to do so, without leave.

(*d*) *Gillott v. Kerr*, W. N. 76, p. 116 ; 24 W. R. 428.

CHAPTER XXXVI.

ENTRY OF JUDGMENT.

EVERY judgment and order must be bespoken by one of the parties within seven days from the time it is pronounced, and, at the same time, counsels' briefs, and such other documents as the Registrar may require for drawing up the judgment or order, must be left with him. A draft of the judgment is then prepared by the Registrar and delivered to the party bespeaking it, with a written appointment of a time for settling the judgment or order, notice of which must be served on the opposite parties at least a day before the time fixed. On the day fixed, the judgment or order is settled by the Registrar in the presence of the parties, who must attend with their briefs and other necessary documents, and, on a subsequent day, it is passed, by the Registrar's affixing his initials at the bottom of the last page, and is then left with the entering clerk for entry. Any party who is dissatisfied with the order as drawn up by the Registrar, must give notice of motion to vary the minutes, and the cause cannot be spoken to on the minutes *ex parte* (a).

(a) *General Share and Trust Co.* 20 Ch. D. 130.
v. Welley Brick and Pottery Co.,

Order 62, rr.
 4—12. Be-
 speaking
 judgment.

Settling and
 passing judg-
 ment.

Order 62, rr.
6, 12.
Default of
attendance.

If the judgment or order is not bespoken, and the briefs and other documents left with the Registrar within the time above prescribed, he may decline to draw up the judgment or order without the leave of the Court or Judge, or should any party fail to attend the appointment to settle the draft or pass the judgment or produce his briefs and other documents, the Registrar may proceed in his absence and dispense with the production of the briefs, or he may require the matter to be mentioned to the Court or the Judge.

Order 62, rr.
13, 14. Ad-
journing.

The Registrar may adjourn any appointment as he thinks fit, and may, if he deems it expedient, settle and pass any judgment or order without making any appointment for that purpose, or giving notice to any party.

Order 41, r. 1.
Judgment to
be entered by
Registrar.

Every judgment must be entered by the Registrar in a book kept for that purpose, and the party entering the judgment must deliver to the Registrar a copy of all the pleadings in the action, except petitions and summons, which pleadings must be printed, except so far as the originals are not required to be printed. If a copy of any pleading has already been delivered to the Registrar, on entering any previous judgment in the same action, delivery of another copy is unnecessary (b).

Order 41, r. 3.
Date of entry
of judgment.

If the judgment is pronounced in Court, the entry of judgment will, unless otherwise ordered, be dated the day of pronouncing judgment, from which day the judgment will take effect, but, in all other cases, the entry

(b) See generally as to the Registrar, Daniell's Ch. Pr., chap. 26, sec. 3, and Morgan, 562.

will be dated the day on which the requisite documents are left with the Registrar, and the judgment will take effect from that date; but the Court, or the Judge in Chambers, may order the judgment to be ante-dated or post-dated.

Whenever it is provided that judgment is to be entered on any affidavit being filed, or document produced, the Registrar, before entering judgment, must examine the affidavit or document, and see that it is regular.

Order 41, r. 6.
Production of
affidavit or
document.

Clerical mistakes in judgments and orders, and errors therein from accidental slips or omissions, may at any time be corrected by the Court on motion without an appeal (c).

Order 41a.
Correction of
errors in
judgments.

Any order made in Chambers may be directed by the Judge to be drawn up by the Registrar, and will then be entered in the same manner as orders made in open Court. It would seem that no proceedings can be taken to attach anyone for disobedience of an order made in Chambers till it has been drawn up and entered (d).

Order 55, r.
74. Orders in
Chambers.

(c) See *Re Savage*, 29 W. R. 348; 78.
Fritz v. Hobson, 14 Ch. D. 542,
561; *Re Riley's Trusts*, 30 W. R.

(d) *Ballard v. Tomlinson*, W. N.
83, p. 90.

CHAPTER XXXVII.

INTERLOCUTORY RELIEF.

Order 50, r. 6.
Judicature
Act, 1873,
s. 25, sub-s. 8.
Injunction,
mandamus, or
receiver.

THE plaintiff, at any time after the issue of the writ, either *ex parte* or with notice, and the defendant, at any time after appearance, with notice to the plaintiff, may apply to the Court, by motion, for an injunction, mandamus, or the appointment of a receiver, and the Court may make the order, if just and convenient, either unconditionally, or on such terms or conditions as seem just. The power to grant injunctions where "just and convenient" does not alter the principles on which the Court should act (a). An order for the appointment of a receiver may be obtained, *ex parte*, by the plaintiff before service of the writ, in an extreme case (b), but the writ must, for that purpose, be endorsed with a claim for a receiver (c). The plaintiff will be appointed receiver and manager without giving security (d). An injunction, or mandamus, will be granted, or a receiver

(a) *Gaskin v. Balls*, 13 Ch. D. 324, 329; *Day v. Brownrigg*, 10 Ch. D. 307; *Beddow v. Beddow*, 9 Ch. D. 89; *Robinson v. Pickering*, 16 Ch. D. 660; *North London Railway Co. v. Great Northern Railway Co.*, 11 Q. B. D. 30.

(b) *H. v. H.*, 1 Ch. D. 276, cited in *Morgan*, at p. 595, as an authority for granting an order before

issue of the writ, and not merely before service, as appears from the report: *Colebourne v. Colebourne*, 1 Ch. D. 690.

(c) *Colebourne v. Colebourne*, 1 Ch. D. 690.

(d) *Taylor v. Eckersley*, 2 Ch. D. 302; *Hyde v. Warden*, 1 Ex. D. 309; *Sargant v. Read*, 1 Ch. D. 600.

appointed, on the application of the defendant (*e*). An injunction may be granted, or receiver appointed, after final judgment (*f*), and even though the writ did not claim a receiver (*g*).

No action or proceeding pending in the High Court of Justice or Court of Appeal can be restrained by prohibition or injunction (*h*), but every matter of equity, on which an injunction against its prosecutor might formerly have been obtained, may be relied on as a defence in the action. The Court may, however, order a stay of proceedings in any action pending before it. Where there are cognate actions pending in the Chancery Division and in a common law division, judgment may be conveniently taken in the common law action with a restriction that it is not to be enforced without the leave of the Judge before whom the Chancery action is pending (*i*). After an agreement for compromise, an order staying proceeding may be made on summons under this section, without the necessity of a fresh action to enforce the agreement for compromise (*k*).

When a *prima facie* case of liability, under a contract, is established by the pleadings, or is shown by affidavit or otherwise, if there are no pleadings, from which liability the defendant claims to be totally or partially relieved, an order may be obtained by the plaintiff for the preservation, or interim custody, of the subject

Judicature
Act, 1873,
s. 24, sub-s. 5.
Actions can-
not be re-
strained by
injunction.

(*e*) *Sargant v. Read*, 1 Ch. D. 600.

(*f*) *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Bryant v. Bull*, 10 Ch. D. 153.

(*g*) *Salt v. Cooper*, 16 Ch. D. 544.

(*h*) *Wright v. Redgrave*, 11 Ch.

D. 24.

(*i*) *Birmingham Estates Co. v. Smith*, 13 Ch. D. 506.

(*k*) *Eden v. Naish*, 7 Ch. D. 781; *Scully v. Dundonald*, 8 Ch. D. 658; but see *Gilbert v. Endean*, 9 Ch. D. 259.

Order 50, rr.
1, 7. Pre-
servation
or interim
custody of
subject
matter.

Payment into Court. matter of the action, or for payment of the amount in dispute into Court, or for otherwise securing it, as soon as the plaintiff's right to the order appears from the pleadings, or by affidavit. An order for payment into Court by a trustee may be made on motion, before delivery of the statement of claim, on an undisputed affidavit that the money is in the hands of the trustee (*m*). A receiver may be appointed in an administration action after the death of the sole defendant, the executrix, before order of revivor (*n*).

Order 50, rr. 2, 6. Sale of perishable goods.

An order may be obtained by the plaintiff, at any time after the issue of the writ, either *ex parte* or with notice, or by the defendant, on notice to the plaintiff, at any time after appearance, for the sale of any goods which, from their perishable nature, or for other reasons, ought to be sold at once. Sale has been ordered under this rule of a horse (*o*), and of Florida State Bonds (*p*).

Order 52, rr. 3, 6. Detention, preservation, or inspection of subject matter.

An order may be obtained by the plaintiff, at any time after the issue of the writ, either *ex parte* or with notice, or by the defendant, on notice to the plaintiff, at any time after appearance, for the detention, preservation, or inspection, of any property which is the subject matter of the action, and the order may authorise access by any persons to the premises of any party to the action, and may authorise samples to be taken, and observations and experiments made, if necessary, for the purpose of obtaining full information or evidence.

(*m*) *Freeman v. Cox*, 8 Ch. D. 148; the old rule that payment into Court by trustees on motion could only be obtained on their own admission being thus abrogated.

(*n*) *Cash v. Parker*, 12 Ch. D. 293.

(*o*) *Bartholomew v. Freeman*, 3 C. P. D. 316.

(*p*) *Coddington v. Jacksonville Ry. Co.*, 39 L. T. 12.

The order may be made on terms that the applicant pay the costs in any event (*q*).

Where the plaintiff, by his statement of claim or writ, or the defendant, by his counterclaim, seeks to recover any specific property, except land, upon which property the opposite party claims a lien, but does not otherwise dispute the title of the party seeking to recover it, the Court, or the Judge, may, as soon as the claim for lien appears from the pleadings, or is shown by affidavit, if there are no pleadings, order the amount of the lien claimed, with a further sum to answer interests and costs, to be paid into Court, to abide the event of the trial, and may order the property to be given up to the party claiming it, on such payment into Court being made.

Order 50, r. 8.
Delivery of
property on
which oppo-
site party
claims lien.

Where the subject matter of the action is real or personal estate, and the Judge is satisfied that it is more than sufficient to answer all the claims made upon it in such action, he may, at any time after the commencement of the proceedings, allow to any of the parties interested the whole or part of the income of either real or personal estate, or part of the corpus of the personal estate (*r*).

Order 50, r. 9.
Allowance.

Two days' notice of motion must be given to the parties affected by the motion, unless leave to serve shorter notice is given, or unless serious mischief is likely to be caused by any delay, in which case relief may be granted *ex parte*, on such terms as to costs and otherwise, and subject to such undertaking, if any, as

Order 52, rr.
3, 5. Notice
of motion.

(*q*) *Mitchell v. Darley Main Colliery Co.*, 10 Q. B. D. 457.

(*r*) This rule is new.

the Court thinks just, but if the order is made *ex parte*, any party affected by it may move to set it aside. Where any party applies for leave to serve short notice he must so state to the Court, and the notice of motion must show that leave to serve short notice has been obtained (*s*). Leave to serve short notice must, in the vacation, be obtained from the vacation Judge (*t*).

Order 38, r. 19.

No *ex parte* order founded on an affidavit will, except by leave of the Court or Judge, have any force unless the affidavit was made and filed before, and produced upon, the motion (*u*).

Order 67, r. 4.
Order 52, r. 8.
Filing notice of motion.

Where any defendant has not appeared within the time limited for so doing, notice of motion or summons will be sufficiently served on him by being filed.

Order 52, rr. 6, 7. Dismissal for want of parties.

If it appears, on the hearing of a motion or summons, that all the proper parties have not been served with notice, the motion may be dismissed, or the hearing may be adjourned to enable any necessary parties to be served. Where parties, who, though defendants, have no substantial interest, have not been served, the motion will not be adjourned, but a conditional order will be made to become binding on the absent parties three days after service unless they show cause (*x*).

Order 52, r. 9. Notice of motion before appearance.

The plaintiff can serve neither notice of motion, nor summons on any defendant before the expiration of the time limited for his appearance, without leave (*y*).

(*s*) *Dawson v. Beeson*, 22 Ch. D. 504.

(*t*) *Conacher v. Conacher*, W. N. 81, p. 2.

(*u*) This rule is new.

(*x*) *Wilson v. Church*, 9 Ch. D. 552, 560.

(*y*) As to short notice, see *supra*, n. (*s*).

Upon any interlocutory application the Court or Judge may, by the order, direct payment of a sum in gross in lieu of taxed costs.

No motion can be made *ex parte*, which could not have been so made prior to the Judicature Acts coming into operation (z), unless provision is expressly made for its being made *ex parte*, or unless the motion is merely for a rule to show cause.

(z) As to what motions could be made *ex parte*, see Daniell' Ch. Pr. under the old practice be made *ex*

Order 65, r. 23. Costs.

Order 52, r. 3. Motion not to be *ex parte*.

CHAPTER XXXVIII.

APPEALS.

Order 58, r. 1. ALL appeals are now by way of re-hearing, and must
By notice of motion. be brought by notice of motion of appeal. Informality in an actual notice of appeal will not invalidate the appeal (a); but a mere suggestion, in the course of correspondence, that there is an intention to appeal is not sufficient (b).

Order 58, r. 1. Any party to the action may appeal from the whole,
Whole or part of decision or part, of any judgment or order, but the notice of
may be appealed from. motion of appeal must state whether the appeal is directed to the whole, or part only, of the judgment or order, and must, in the latter event, specify the part of the judgment, or order, to which the appeal is directed (c). One of several co-plaintiffs may appeal alone, where the others refuse to join (d).

Order 58, r. 2. Notice of motion of appeal may be amended at any
Amendment of notice of appeal. time, as the Court of Appeal thinks fit. Thus, where by a simple slip, fourteen days', instead of four days', notice

(a) *Little's case*, 8 Ch. D. 806; and see *Kettlewell v. Watson*, W. N. 83, p. 102; 31 W. R. 709.

(b) *Re Blyth v. Young*, 13 Ch. D. 416; *Re New Callao*, 22 Ch. D. 484.

(c) But see and consider *Re*

Duchess of Westminster Silver Lead Ore Co., 10 Ch. D. 307, as to the apparent non-importance of compliance with this rule.

(d) *Beckett v. Atwood*, 18 Ch. D. 54.

has been given, leave will be given to amend the notice at the hearing of the appeal (e).

Notice of motion of appeal need only be served on the parties directly affected by the appeal, but the Court of Appeal may direct notice to be served on any other parties to the action besides those originally served, or upon any person who is not a party to the action, and may adjourn the hearing of the appeal, for that purpose, on such terms as seem just, and may ultimately give judgment, or make an order, as if the parties ordered to be served with notice of motion of appeal had been originally made respondents. Parties who are affected by the appeal may appear, though not served with notice of the appeal, and will be entitled to their costs if the appeal fails from any cause (f).

Where the appeal is from a judgment, fourteen days' notice of motion of appeal is necessary,

Order 58, r. 3.
Appeal from judgment.

Where the appeal is from an interlocutory order, four days' notice of motion of appeal is necessary.

Order 58, r. 3.
Appeal from interlocutory order.

Any person served with notice of motion of appeal, who intends, on the hearing of the appeal, to contend that the decision of the Court below ought to be varied in his favour, should, in the case of an appeal from a judgment, give eight days' notice, or, in the case of an appeal from an interlocutory order, two days' notice, of his intention to any parties who may be affected by his contention, notice of motion by way of cross-appeal.

Order 58, rr. 6, 7. Notice by respondent of cross-appeal.

(e) *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335, 349.

(f) *Re New Callao*, 22 Ch. D. 494.

being now unnecessary. Where the appeal is dismissed with costs, the costs occasioned by the respondent's cross-notice will be deducted from the costs of the appeal (*g*). A respondent will not be allowed to raise, by cross-notice, questions in which the appellant is not interested, but must give notice of appeal (*h*). The omission by the respondent to give notice will not diminish the powers vested in the Court of Appeal of deciding in favour of any respondents or any other parties to the action, whether appealing from, or complaining of, the decision of the Court below or not (*i*), but may be a ground for adjourning the hearing of the appeal and making a special order as to costs (*k*). It would seem that the cross-notice may be given at any time before the hearing of the appeal (*l*).

Order 58, r. 8.
Setting down
appeal

The appellant must produce to the Registrar, at least two clear days before the day for which notice of motion of appeal is given (*m*), the judgment or order appealed against, or an office copy, and must also leave with the Registrar a copy of the notice of motion of appeal for filing, and the appeal will, thereupon, be set down for hearing in the proper list, and will come on for hearing in its order on the list, unless otherwise directed; but it will not be placed in the paper before the day named in the notice of motion of appeal. Where the appeal

(*g*) *The Lauwetta*, 4 P. D. 25; and see *The City of Manchester*, 42 L. T. 521; *Robinson v. Drakes*, 23 Ch. D. 98; but see *Harrison v. Cornwall Minerals Ry. Co.*, 18 Ch. D. 346, where the costs were divided equally.

(*h*) *Re Cavander's Trusts*, 16 Ch. D. 270; but see and consider *Ralph*

v. Carrick, 11 Ch. D. 873.

(*i*) *Post*, p. 155.

(*k*) *Hunter v. Hunter*, W. N. 76, p. 138; 24 W. R. 504, 527.

(*l*) *Ex parte Bishop*, 15 Ch. D. 400.

(*m*) Registrar's Regulations, Morgan, p. 609.

is from the refusal of an application, neither the order nor a copy need be produced to the Registrar (*n*). If the appeal is not set down before the day named for hearing in the notice of motion of appeal, or, if that day falls in the vacation, before the first day of the next sittings, the respondent is entitled to have it dismissed as abandoned (*o*), unless setting down the appeal in time was rendered impossible by the respondent's delay in drawing up the order (*p*); but he must make a substantive application for his costs (*q*), and must give proper notice of motion (*r*). Before the respondent moves the Court of Appeal, he should apply out of Court for the costs of an abandoned motion, and if he omits to do so, he will not be allowed the costs of his motion (*s*). Where the appellant has allowed the time for setting down his appeal to go by (*t*), or has withdrawn it (*u*), he may serve fresh notice of motion of appeal, but it would seem that after withdrawing it, leave to serve fresh notice is necessary (*x*). If, on the appeal being called on, no one appears for the appellant, the appeal will be dismissed with costs, without proof of service of notice of appeal being required (*y*).

On appeal from refusal of order.
Appeal dismissed if not set down in time.

(*n*) *Smith v. Grindley*, 3 Ch. D. 80.

(*o*) *Re National Funds Assurance Co.*, 4 Ch. D. 305; *Rhodes v. Jenkins*, 7 Ch. D. 711; *Coalhupe v. Lewis*, W. N. 79, p. 180; *Machu v. O'Connor*, W. N. 78, p. 144; *Waddell v. Blockley*, 10 Ch. D. 416.

(*p*) *Goodbarne v. Fothergill*, 10 Ch. D. 613.

(*q*) *Webb v. Mansel*, 2 Q. B. D. 117; *Charlton v. Charlton*, 16 Ch. D. 273.

(*r*) *Re Oakwell Collieries Co.*, 7 Ch. D. 706.

(*s*) *Griffin v. Allen*, 11 Ch. D. 913.

(*t*) *Norton v. L. & N. W. Ry. Co.*, 11 Ch. D. 118.

(*u*) *Watson v. Cave*, W. N. 81, p. 24.

(*x*) *Watson v. Cave*, 17 Ch. D. 23.

(*y*) *Ex parte Loue*, 7 Ch. D. 160; *Magnus Spanier v. Marchant*, W. N. 78, p. 214.

Order 58, r. 15. Time for appeal from interlocutory order.

No appeal from any interlocutory order in an action, or from any order not made in an action, will be allowed, except by special leave of the Court of Appeal, unless notice of motion of appeal is given (z) within twenty-one days from the time when the order was made, or when the appellant first had notice of it, in case of orders made in Chambers (a), and, in all other cases, within twenty-one days from the entry of the order appealed against, or, in the case of an appeal from the refusal of an application, within twenty-one days from the date of refusal. Where several claims are joined in one summons, of which one is refused, and the rest allowed, time for an appeal from the refusal runs from the date of refusal, not from the entry of the order (b), as is also the case where the refusal appealed from was accompanied by an order for costs against the appellant (c). But an order refusing an application, which contains an expression of opinion or declaration, is different, and time will not run, in such a case, from the date of the refusal (d). The disallowance of a claim brought in by a creditor in an administration action is a refusal within the meaning of the rule (e). An order on an interpleader issue is interlocutory (f), as is also an order for a new trial (g), an order on a summons of a

What orders are interlocutory.

(z) *Ex parte Viney*, 4 Ch. D. 794; *Ex parte Saffery*, 5 Ch. D. 365.

(a) This distinction between orders made in Chambers and other orders is new.

(b) *Trail v. Jackson*, 4 Ch. D. 7; *Berdan v. Birmingham Small Arms and Metal Co.*, 7 Ch. D. 24.

(c) *Swindell v. Birmingham Syn-*

dicate, 3 Ch. D. 127.

(d) *Re Clay v. Tetley*, 16 Ch. D. 3.

(e) *Fordham v. Claggett*, 20 Ch. D. 134.

(f) *M'Andrew v. Barker*, 7 Ch. D. 701.

(g) *Highton v. Treherne*, W. N. 78, p. 227; 48 L. J. Ex. 167.

creditor in an administration action to which he is not a party (*h*), or judgment on a special case stated by an arbitrator to whom the action has been referred (*i*), unless final judgment may have to be entered as the result of the appeal (*k*). Where definite issues are settled at the commencement of trial of an action in the Chancery Division, it has been held that the finding of the Judge is interlocutory, and that an appeal must be brought within twenty-one days (*l*); but in ordinary cases judgment in the Chancery Division is not interlocutory, though it deals only with questions of fact, and an appeal from it may be brought within a year (*m*). An application to vary the chief clerk's certificate is interlocutory, and an appeal from an order, or refusal, to vary, even though made at the hearing of the cause on further consideration, must be brought, in the case of an order to vary, within twenty-one days from entry of the order (*n*), and in the case of a refusal to vary, within twenty-one days from the date of refusal (*o*). An order overruling a demurrer is not interlocutory (*p*), nor is an order on admissions in the pleadings, under Order 40, rule 11, necessarily interlocutory (*q*).

No appeal from any judgment, or final order, will be allowed, except by special leave of the Court of Appeal, Order 58, r. 15. Time for appeal from

(*h*) *Pheysey v. Pheysey*, 12 Ch. D. 305.

(*i*) *Collins v. Vestry of Paddington*, 5 Q. B. D. 368.

(*k*) *Strubbrook v. Tufnell*, 9 Q. B. D. 621.

(*l*) *Krehl v. Burrell*, 10 Ch. D. 420; but see *Potter v. Cotton*, 5 Ex. D. 137, where *Krehl v. Burrell* is questioned.

(*m*) *Lowe v. Lowe*, 10 Ch. D. 432; and see *Dollman v. Jones*, 12 Ch. D. 553.

(*n*) *White v. Witt*, 5 Ch. D. 589.

(*o*) *Cummins v. Heron*, 4 Ch. D. 787.

(*p*) *Trowell v. Shenton*, 8 Ch. D. 318.

(*q*) *Att.-Gen. v. Gt. Eastern Ry. Co.*, 48 L. J. Ch. 432.

judgment or
final order.

unless notice of motion of appeal is given (r) within a year from the time the judgment, or order, is signed, entered, or otherwise perfected, or, in the case of an appeal from the refusal of any application, within a year from the date of refusal: thus, where an action is dismissed with costs at the hearing, the time runs from the date of its dismissal, and not from the entry of the judgment (s).

Time to appeal
only extended
on special
grounds.

Where the time for appeal has expired, any person applying for leave to appeal must show special grounds for indulgence, such as *bond fide* mistake, surprise, unavoidable accident, or that he has been misled in some way (t), and leave will not be granted *ex parte* (u). The mere fact that the appellant has misunderstood the rules is not such a special circumstance as will induce the Court of Appeal to extend the time (x). Where persons affected by an order are resident abroad, the time for appealing will be extended to allow of their being consulted, but they must pay the costs of the application (y). Time will be extended with greater

(r) *Ex parte Viney*, 4 Ch. D. 794; *Ex parte Saffery*, 5 Ch. D. 365.

(s) *International Financial Society v. City of Moscow Gas Co.*, 7 Ch. D. 241.

(t) *International Financial Society v. City of Moscow Gas Co.*, 7 Ch. D. 241; *Swindell v. Birmingham Syndicate*, 3 Ch. D. 127, 133; *Trail v. Jackson*, 4 Ch. D. 9; *Craig v. Phillips*, 7 Ch. D. 249; *Re Blyth v. Young*, 13 Ch. D. 420; and see *Curtis v. Sheffield*, 21 Ch. D. 5; *Re New Callao*, 22 Ch. D. 484.

(u) *Errenett v. Lawrence*, 4 Ch.

D. 139.

(x) *International Financial Society v. City of Moscow Gas Co.*, 7 Ch. D. 241; *Rhodes v. Jenkins*, 7 Ch. D. 711; *Highton v. Treherne*, W. N. 78, p. 227; 48 L. J. Ex. 167; *Re Sceptre and Licensed Victuallers Insurance Co.*, W. N. 79, p. 6; *Collins v. Vestry of Paddington*, 5 Q. B. D. 368, in which last case, however, Bramwell, L. J., considered that any *bond fide* slip ought to be relieved against; and see *Re Manchester Economic Building Society*, W. N. 83, p. 161.

(y) *Re Jaques*, 18 Ch. D. 392.

reluctance where the appeal is obviously speculative (z).

Where an *ex parte* application has been refused by the Court below, a similar application for the same purpose may be made, *ex parte*, to the Court of Appeal, within four days from the date of the refusal of the application, or within such further time as may be allowed by the Court below, or by a Judge of Appeal; but the application for further time must be made, in the first instance, to the Court below.

The Court of Appeal may require the appellant to give security for costs under special circumstances, both the amount of the security, and the method of giving it, being within their discretion. The fact that the appellant is a foreigner not domiciled in England is sufficient to entitle the respondent to security for his costs (a), unless the appellant has property within the jurisdiction of a substantial nature (b); but a mere temporary residence here, solely for the purpose of prosecuting the suit, will disentitle the respondent to such security (c). The fact that the appellant is a pauper, or in insolvent circumstances, is, *prima facie*, a sufficient reason for ordering him to give security for costs (d). Where the appellant has amended his statement of claim at a late stage, so as to raise an entirely new case, this has been

Order 58, r. 10. Time for appeal from refusal of *ex parte* application.

Order 58, r. 15. Order 65, r. 6. Security for costs.

Ground for application.

(z) *Re Madras Irrigation and Canal Co.*, 23 Ch. D. 254.

(a) *Grant v. Banque Franco-Egyptienne*, 2 C. P. D. 430.

(b) *Redondo v. Chayter*, 4 Q. B. D. 453; *Hamburger v. Poetting*, 30 W. R. 769.

(c) *Redondo v. Chayter*, *supra*.

(d) *Hankin v. Turner*, 10 Ch. D. 376; *Ex parte Isaacs*, 9 Ch. D. 271; *Wilson v. Smith*, 2 Ch. D. 37; *Harlock v. Ashberry*, 19 Ch. D. 84; *Spenser v. Hart*, 45 L. T. 396; but see *Usil v. Brearly*, 3 C. P. D. 206.

Nature of
security.

considered a special circumstance, entitling the respondent to security for costs (*e*). It would seem that the fact that only one of several co-plaintiffs has appealed, is a ground for requiring security (*f*). Security for costs will be granted with equal readiness, whether the appellant is plaintiff or defendant (*g*). Security may be ordered to be given, either by paying money into Court, or by giving a bond with sureties (*h*). The order will not be made in the form that, if the security is not given within a specified time, the action will be dismissed (*i*), but, if not given within a reasonable time (the reasonableness depending on the circumstances of each case), the appeal will be dismissed on the application of the respondent (*k*), and the right to appeal will then be gone for ever (*l*). An order requiring the appellant to give security for costs will not ordinarily be made, after the costs have been actually incurred by the respondent, and a time has been fixed for the hearing of the appeal (*m*); but there is no inflexible rule, except that the applicant must apply with promptitude, having regard to all the circumstances of the case (*n*). Notice of a motion for security for costs may

(*e*) *Northampton Coal Co. v. Midland Waggon Co.*, 7 Ch. D. 500.

(*f*) *Beckett v. Allwood*, 18 Ch. D. 54.

(*g*) *Dence v. Mason*, W. N. 79, p. 31.

(*h*) *Phosphate Sewage Co. v. Hartmont*, 2 Ch. D. 811.

(*i*) *Wilson v. Smith*, 2 Ch. D. 67; *Polini v. Gray*, 11 Ch. D. 741.

(*k*) *Judd v. Green*, 4 Ch. D. 784;

Vale v. Oppert, 5 Ch. D. 633; *Polini v. Gray*, *supra*.

(*l*) *Harris v. Flemming*, 30 W. R. 555.

(*m*) *Grant v. Banque Franco-Egyptienne*, 1 C. P. D. 143; *Hutchins v. Romer*, W. N. 79, p. 99; *Mayor of Saltash v. Goodman*, 43 L. T. 464.

(*n*) *Re Indian, Kingston, and Sandhurst Mining Co.*, 22 Ch. D. 83.

be given without leave (*o*). The respondent should, in the first instance, apply out of Court to the appellant for security to prevent unnecessary expense, and, if he fails to do so, may be deprived of the costs of the motion (*p*).

No appeal will operate as a stay of execution, or a stay of proceedings, under the judgment, or order, appealed from, unless the Court below, or the Court of Appeal, so orders; and an application for an order staying execution or proceedings, pending appeal, must be made, in the first instance, to the Court below, even where the action has been dismissed (*q*). Under special circumstances, proceedings under a decree for account may be stayed pending appeal (*r*), but it is not usual to make the order (*s*). Stay of proceedings will be ordered on the terms of the appellant's paying the costs of the application, and also paying into Court, or to the respondent's solicitor, on an undertaking to refund, if necessary, any costs which the appellant is liable to pay under the judgment, or order, appealed from (*t*), and, where payment out of money in Court is stayed, on an undertaking to make good the interest up to 4 per cent. (*u*). The order will not be made *ex parte* (*x*). Pending an appeal to the House of Lords,

Order 58, rr. 16, 17.
Appeal
no stay of
proceedings
unless so
ordered.

Terms of
order staying
proceedings.

(*o*) *Grills v. Dillon*, 2 Ch. D. 325.

(*p*) *Ship Constantine*, 4 P. D. 156.

(*q*) *Otto v. Lendford*, 18 Ch. D. 394, explaining *Wilson v. Church*, 11 Ch. D. 576.

(*r*) *Adair v. Young*, 11 Ch. D. 136.

(*s*) *Hyam v. Terry*, 29 W. R. 32.

(*t*) *Cooper v. Cooper*, 2 Ch. D. 492; *Morgan v. Elford*, 4 Ch. D. 388; *Grant v. Banque Franco-Egyptienne*, 3 C. P. D. 202; *Eames v. Hacon*, W. N. 81, p. 4; and for the earlier cases, see *Morgan*, p. 615.

(*u*) *Brewer v. Yorke*, 20 Ch. D. 669.

(*x*) *The Republic of Peru v*

stay of proceedings may be ordered by the Court of Appeal (y), but the Court of first instance has no jurisdiction to make the order at that stage (z).

Order 58, r. 4.
Court of
Appeal has all
the powers of
Court of first
instance.

The Court of Appeal has the same powers and duties, as to amendment and otherwise, as a Court of first instance, and has, also, power to receive further evidence on questions of fact. The appellant will not, however, be allowed to raise on the appeal a case inconsistent with that raised in the Court below (a), or not warranted by the pleadings (b). Under very special circumstances the appellant will be allowed on the appeal to withdraw his defence and put in a fresh defence (c).

Order 58, r. 4.
Admission of
further
evidence on
appeal.

On an appeal from an interlocutory order, further evidence may be given without leave, but on an appeal from a judgment after the trial or hearing of the action, no further evidence, except as to matters which have occurred since the date of the judgment appealed from, will be admitted without leave of the Court of Appeal, which will only be granted on special grounds (d). Leave may be granted at the hearing of the appeal, but previous notice of the intention to apply for leave should be given to the other side (e); this rule, however, only

Weguelin, 24 W. R. 297; *Emma Mining Co. v. Lewis & Son*, 48 L. J. C. P. 504.

(y) *Wilson v. Church*, 12 Ch. D. 454; *Polini v. Gray*, 12 Ch. D. 438.

(z) *The Khedive*, 5 P. D. 1.

(a) *Ex parte Reddish*, 5 Ch. D. 882; *Ex parte Firth*, 19 Ch. D. 419.

(b) *New Zealand & Australian Land Co. v. Watson*, 29 W. R. 696.

(c) *Williams v. Preston*, 20 Ch. D. 672.

(d) *Biggby v. Dickinson*, 4 Ch. D. 24; *Re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108, 116; *Weston's case*, 10 Ch. D. 579; 48 L. J. Ch. 425; and see *Sanders v. Sanders*, 45 L. T. 637, where Jessell, M.R., pointed out how conducive to perjury it was to admit fresh evidence after trial.

(e) *Hastie v. Hastie*, 1 Ch. D. 562; *Justice v. Mersey Steel and*

applies in case of affidavit and documentary evidence, and where fresh witnesses are to be examined *vivâ voce* on the appeal, the application for leave should be made by previous motion (*f*). Where the respondent intends to object to the admission as evidence of a further affidavit, he ought not to answer it before the appeal comes on; but if his objection is overruled, he should apply for leave to answer (*g*). A witness who has been examined *vivâ voce* in the Court below will not be allowed to supplement his evidence by affidavit on appeal (*h*). Leave to subpœna a fresh witness may be given, without prejudice to the question whether his evidence is to be received (*i*).

Further evidence may be given *vivâ voce* at the hearing of the appeal, or may be taken by affidavit, or by depositions before an examiner or commissioner. Affidavits used in chambers before the chief clerk, but not at the trial, are further evidence, and may be used by leave on appeal (*k*).

Evidence taken in the Court below by affidavit must be brought before the Court of Appeal by the production of printed copies of those affidavits which have already been printed, and of office copies of those which have not been already printed; but, where the evidence is very voluminous, the production to the Court of office

Order 58, r. 4.
Mode of
giving further
evidence.

Order 58, r.
11. Affidavits
produced on
appeal.

Iron Co., 24 W. R. 199; *Jones v. Chennell*, 8 Ch. D. 492, 504; but see *Re Orr Ewing's Trade Marks*, 26 W. R. 777.

(*f*) *Dicks v. Brooke*, 13 Ch. D. 652.

(*g*) *Mitchell v. Condry*, W. N. 81, p. 83.

(*h*) *Taylor v. Grange*, 15 Ch. D. 165.

(*i*) *Gover's case*, 24 W. R. 36.

(*k*) *Jones v. Chennell*, 8 Ch. D. 504, where the grounds for admitting such further evidence are fully discussed by Jessel, M.R.

r. 12. Affidavits not already printed.

Order 58, r. 11. *Vivâ voce* evidence in Court below.

copies will be dispensed with (*l*). If the affidavits have not been printed in the Court below, the Court, or a Judge, of Appeal may order them to be printed for the purpose of appeal, but any party printing them, without an order, will be liable for the costs, unless otherwise ordered by the Court, or a Judge, of Appeal.

Evidence taken *vivâ voce* in the Court below at the hearing must be brought before the Court of Appeal by the production of a copy of the Judge's notes, or of such other materials as the Court of Appeal deems expedient. The Court of Appeal strongly discourages shorthand notes of evidence, and the costs of such notes will not as a general rule be allowed (*m*); at any rate, not unless the evidence is used before the Court of Appeal (*n*). To enable the taxing master to allow such costs, there must be a special direction by the Court of Appeal at the hearing of the appeal (*o*), or to the Judge at the trial (*p*), by whom the costs will, it seems, be allowed, except in very trivial cases (*q*); only the costs of making a transcript of, and printing the shorthand notes will be allowed, and not the costs of the attendance of the shorthand writer to take the notes (*r*).

(*l*) *Crawford v. Hornsea Steam Brick and Tile Works Co.*, 24 W. R. 422.

(*m*) *Kelly v. Byles*, 13 Ch. D. 692; *Re Duchess of Westminster Silver Lead Ore Co.*, 10 Ch. D. 312; *Vernon v. Vestry of St. James'*, 16 Ch. D. 473; *Earl de la Warr v. Miles*, 19 Ch. D. 80; but see *Bigsby v. Dickenson*, 4 Ch. D. 32; *Leadley v. Sykes*, W. N. 75, p. 252.

(*n*) *Ex parte Webster*, 22 Ch. D.

136.

(*o*) *Ashworth v. Outram*, 9 Ch. D. 483; *Hill's Executors v. Managers of Metropolitan Asylum District*, W. N. 80, p. 98; 49 L. J. Q. B. 668.

(*p*) *Earl de la Warr v. Miles*, 19 Ch. D. 80.

(*q*) *Gandy v. Reddaway*, W. N. 83, p. 89.

(*r*) *Bigsby v. Dickenson*, 4 Ch. D. 24, 32; *Ex parte Sawyer*, 1 Ch. D. 698.

Any judgment may be given, or order made, on appeal which ought to have been made by the Court below, whether the notice of motion of appeal is directed to the whole decision appealed against or not, and whether the respondents, or other parties to the action, in whose favour the Court below ought to have decided, have appealed from, or complained of, the decision or not (s). Order 58, r. 4.
Order or
judgment on
appeal.

In cases of trial without a jury, any application for new trial must be by way of appeal to the Court of Appeal, which may, if it thinks that a new trial ought to be had, order that the verdict and judgment be set aside and a new trial had (t). Order 39, r. 1.
Order 58, r. 5.
New trial.

The Court of Appeal may make any order as to the costs of the appeal which seems just, the general rule being that the successful appellant will get his costs (u), unless he succeeds on a new point (x). Order 58, r. 4.
Costs in dis-
cretion of
Court.

The Court of Appeal cannot entertain an appeal from any judgment or order which has been taken by consent, nor can it entertain an appeal as to costs, unless leave to appeal is granted by the Court below, which leave can only be granted at the hearing (y). An appeal will lie from an order depriving a trustee of his costs (z), or from an order as to costs, which involves Judicature
Act, 1873, s.
49. No appeal
from judg-
ment or order
by consent,
or as to costs.

(s) *Hunter v. Hunter*, W. N. 76, p. 138; 24 W. R. 527.

(t) It would seem, having regard to the decision of *Krehl v. Burrell*, 10 Ch. D. 420, that this rule applies to Chancery actions where, as in that case, there is a distinct finding on a question of fact.

(u) *Memorandum*, 1 Ch. D. 41;

Ex parte Masters, 1 Ch. D. 113.

(x) *Goddard v. Jeffreys*, 46 L. T. 904.

(y) *May v. Thompson*, W. N. 82, p. 53.

(z) *Turner v. Hancock*, 20 Ch. D. 303; *Farrow v. Austin*, 18 Ch. D. 58; but see *Re Hoskin's Trusts*, 6 Ch. D. 281.

a question of principle (a) or practice (b), or is prefaced by a declaration of opinion (c). The Court of Appeal cannot, where the action has been dismissed without costs, vary the order by dismissing it with costs (d).

(a) *The City of Manchester*, 42 L. T. 521; *Att.-Gen. v. Vestry of Bermondsey*, 23 Ch. D. 60.

(b) *Cooper v. Vesey*, 20 Ch. D. 611.

(c) *Witt v. Corcoran*, 2 Ch. D. 69.

(d) *Harris v. Aaron*, 4 Ch. D. 749; *Graham v. Campbell*, 38 L. T. 195; *Harpham v. Shacklock*, 19 Ch. D. 215; *Llanover v. Homfray*, 19 Ch. D. 232; but see *Dicks v. Yates*, 44 L. T. 660.

CHAPTER XXXIX.

TRANSFER OF ACTIONS.

ANY cause or matter may be transferred from one Division to another, or from one Judge of the Chancery Division to another, by order of the Lord Chancellor, but the consent of the Presidents of the respective divisions is necessary in the former case. Transfer will be ordered in case of cognate actions before different Judges of the Chancery Division (*a*). In case of cognate actions in the Chancery Division and one of the Common Law Divisions, it may, on occasion, in preference to transfer, be better to take judgment in the Common Law action, to be enforced only by leave of the Chancery Judge (*b*).

Order 49, r. 1.
By order of
Lord
Chancellor.

In case of a transfer from one Judge of the Chancery Division to another, the order for transfer, or a separate order, may specify that the cause or matter is transferred for the purpose of hearing or trial only, in which case the original, and any further, hearing will take place before the Judge to whom the action is transferred; but all other proceedings in the action, whether

Order 49, r. 2.
For hearing
only.

(*a*) *Daris v. Davis*, 48 L. J. Ch.
40.

(*b*) *Birmingham Estate Co. v. Smith*, 13 Ch. D. 506.

before or after the hearing, must be taken before the Judge to whom the action was assigned at the time of transfer, unless the Judge to whom it is transferred directs that further proceedings should be taken before himself, or an Official or Special Referee. A petition for a charging order on the fund the subject of the action is a further proceeding within the meaning of the rule, and may be ordered by the Judge to be heard by himself (c); as may an application for stay of proceedings pending appeal (d), or to correct a slip in the judgment (e). It is doubtful whether in the case of an action transferred for the purpose of the hearing only, the Judge to whom the action was assigned at the time of transfer has power to adjourn the hearing of any interlocutory application in the action to the Judge to whom it is transferred (f).

Mode of
application
for transfer.

Where all parties consent, the application for transfer should be made in writing to the Lord Chancellor's secretary, the written application being accompanied by a written consent of all the parties to the action; where all parties do not consent to the proposed transfer, the application must be made to the Lord Chancellor in Court (g). The Court of Appeal has no jurisdiction to order a transfer (h).

Order 49, r. 5. Any cause or matter pending in another Court or Winding up

(c) *Porter v. West*, W. N. 80, p. 195; 43 L. T. 569.

(d) *Orr Ewing & Co. v. Johnston*, 41 L. T. 467.

(e) *Fritz v. Hobson*, 14 Ch. D. 542, 561; *Shaw v. Brown*, W. N. 81, p. 27; 50 L. J. Ch. 232.

(f) *Lloyd v. Jones*, 7 Ch. D. 390;

Associated Home Co. v. Whichcorn, 47 L. J. Ch. 654; but see *Robinson v. Chadwick*, 26 W. R. 421; *Shaw v. Brown*, *supra*.

(g) *Memorandum*, 1 Ch. D. 41.

(h) *Re Hulley*, 1 Ch. D. 11; *Re Boyd's Trusts*, 1 Ch. D. 12.

Division by, or against, a company which is in course of being wound up, or by, or against, the executors or administrators of any testator, or intestate, whose assets are in course of being administered under an order of the Court, may be ordered by the Judge, in whose Court the winding up, or administration, is pending, to be transferred to himself without any further consent being necessary. On the transfer of an action against an executor, the order will provide that further proceedings in the first action be stayed, with liberty to the plaintiffs in that action to prove for their claims and costs in the administration action (*i*). An action against an executor in a Common Law Division will not be transferred unless it is clear that it is against him in his representative character (*k*). The application for transfer may be made *ex parte* (*l*).

Any cause or matter may be transferred, at any stage, from one Division to another, by order of the Court, or of any Judge of the Division to which the action is assigned, but, except in the case of actions by or against companies in course of winding up, or executors or administrators of persons whose estates are in course of administration, no transfer can be made without the consent of the President of the Division to which the action is to be transferred. An order for transfer may

Order 49, r. 3.
By order of
Judge to
whom it is
assigned.

(*i*) *Hanson v. Stubbs*, 8 Ch. D. 154; and see *West v. Downman*, W. N. 79, p. 13; 27 W. R. 355; but see *contra Re Timms*, W. N. 78, p. 141; 47 L. J. Ch. 831, where Bacon, V.-C., on transfer refused to stay proceedings in the first action.

(*k*) *Chapman v. Mason*, W. N. 79, p. 93; 40 L. T. 678.

(*l*) *Field v. Field*, W. N. 77, p. 98; *Re Landore Siemens Steel Co.*, 10 Ch. D. 489; but see *Re United Kingdom Telegraph Co.*, 29 W. R. 332.

be made by a Common Law Judge sitting at Chambers, though not a Judge of the Division to which the action is assigned (*m*). Though no actual transfer can take place till the consent of the President has been obtained, the order for transfer may be taken before applying for his consent (*n*); but where the President sitting in the Divisional Court, on the application for transfer, has concurred in refusing the order, it would seem that the Court of Appeal has no jurisdiction to make the order (*o*). An action properly assigned, in the first instance, to one of the Common Law Divisions has, on delivery of a counterclaim for specific performance, been ordered to be transferred to the Chancery Division (*p*). An action for salvage assigned to the Chancery Division will be ordered to be transferred to the Admiralty Division (*q*). Where an action assigned to the Chancery Division is ordered to be tried by a Judge with a jury, the proper course is to obtain an order for transfer to one of the Common Law Divisions prior to the trial, obtaining a re-transfer after the trial if necessary (*r*). An order for transfer cannot be made *ex parte* (*s*).

Equitable
counterclaim.

Order 49, r. 7. Any order for transfer to the Chancery Division
Order must
name Judge.

(*m*) *Hillman v. Mayhew*, 1 Ex. D. 132.

(*n*) *Humphreys v. Edwards*, W. N. 75, p. 208; 45 L. J. Ch. 112.

(*o*) *Storey v. Waddle*, 4 Q. B. D. 289.

(*p*) *Hillman v. Mayhew*, 1 Ex. D. 132; *Holloway v. York*, 2 Ex. D. 333; *Smyth v. Levinge*, 39 L. T. 579; but see *contra* *Storey v. Waddle*, 4 Q. B. D. 289. As *Holloway v. York* and *Storey v. Waddle* are both decisions of the

Court of Appeal, and in direct opposition to each other, the question whether an equitable counterclaim entitles the defendant to a transfer may be deemed an open one.

(*q*) *Humphreys v. Edwards*, W. N. 75, p. 208; 45 L. J. Ch. 112.

(*r*) *Clements v. Norris*, W. N. 78, p. 4; *Hunt v. Chambers*, 20 Ch. D. 365.

(*s*) *Humphreys v. Edwards*, 45 L. J. Ch. 112.

must name the Judge to whom the action is to be transferred.

Causes or matters pending in the same Division may be consolidated, by order of the Court or a Judge, in the manner hitherto in use in the Superior Courts of Common Law. Where actions are consolidated, the same evidence may be used in them all (*t*). Where there are numerous actions against the same defendant raising substantially the same question, one may be ordered to be tried first as a test action, the others being stayed meanwhile (*u*).

Order 49, r. 8.
Consolidation.

(*t*) *Smith v. Whichcord*, 24 W. 459; *Bennett v. Bury*, 5 C. P. D. R. 900. 339.

(*u*) *Amos v. Chadwick*, 9 Ch. D.

CHAPTER XL.

CHANGE OF PARTIES BY DEATH, &C.

Order 17, r. 1.
No abatement
on marriage,
death, or
bankruptcy.

Order 17, rr.
1, 3. Action
not rendered
defective by
change of
interest.

No action will become abated by the marriage, death, or bankruptcy, of any of the parties, provided that the cause of action survives or continues, (in some person who is before the Court (a),) nor will it become defective by the assignment, creation, or devolution, of any estate or title *pendente lite*, but may be continued by, or against, the person to, or upon, whom the estate or title has come or devolved (b). A receiver will be appointed in an administration action, to prevent the assets being wasted, after the death of the executrix, the sole defendant, and before an order of revivor has been obtained (c): but where the plaintiff becomes bankrupt after the commencement of the action, he cannot proceed with it (d), nor can the defendant, without notice to the trustee in bankruptcy, obtain an order against the plaintiff dismissing his action for want of prose-

(a) *Eldridge v. Burgess*, 7 Ch. D. 411.

(b) But *semble*, not without an order for that purpose, under rr. 2, 4.

(c) *Cash v. Parker*, 12 Ch. D. 293.

(d) *Jackson v. North Eastern Railway Co.*, 5 Ch. D. 845; *Warder v. Saunders*, 10 Q. B. D. 114; but see and consider *Jameson v. Brick Stone Co.*, 4 Q. B. D. 208; *Emden v. Carte*, 17 Ch. D. 169.

cution (e), or obtain judgment against him, where no one appears for him at the trial of the action (f).

Where either party dies between the verdict, or finding of issues of fact, and the judgment, there will be no abatement, whether the cause of action survives or not; but judgment may be entered notwithstanding the death.

Order 17, r. 1.
Death after verdict.

Where any change, transmission, creation, or devolution, of interest or liability, arising from the marriage (g), death (h), bankruptcy (i), or assignment (k), of any party to the action, or from the birth of any person, or from any other event, occurs after the commencement of the action, which renders it necessary, or desirable, that any new parties should be added, or that any persons, already parties in one capacity, should be added as parties in another capacity, an order to that effect may be obtained *ex parte*. Where a garnishee order is obtained attaching moneys recovered in an action, there is such a devolution as to entitle the person obtaining the garnishee order to be made a plaintiff in the action (l). The application for the order should not, (except under very special circumstances (m)), be made to the Court, but at the order of course office (n), and will be granted on an allegation (by affi-

Order 17, rr. 2, 4. Adding parties on change or transmission of interest or liability *pendente lite*.

By order of course.

(e) *Wright v. Swindon & Marlborough & Andover Railway Co.*, 4 Ch. D. 164.

(f) *Eldridge v. Burgess*, 7 Ch. D. 411.

(g) *Darcy v. Whittaker*, W. N. 76, p. 17.

(h) *Stone v. Bennett*, W. N. 76, p. 152; *Re Aikin's Estate*, 1 Ch. D. 82.

(i) *Jackson v. North Eastern*

Railway Co., 5 Ch. D. 844; *Walker v. Blackmore*, W. N. 76, p. 112.

(k) *Middleton v. Pollock*, W. N. 76, p. 250; *Re Paris Skating Rink Co.*, 5 Ch. D. 959.

(l) *Wallis v. Smith*, 46 L. T. 473.

(m) *Haldane v. Eckford*, W. N. 79, p. 80.

(n) *Raffey v. Miller*, W. N. 75, p. 225; 24 W. R. 109; *Middleton*

davit (o)) of the circumstances which render it necessary to obtain the order (p). Where the action has been dismissed, and there is a pending appeal, the order of revivor is still properly obtainable at the order of course office (q). Any person who has been served with an administration decree, and has obtained liberty to attend, may, on the death of the plaintiff, obtain an order of course to prosecute the action (r). Where new parties are added, or substituted, under this rule, the title of the action must be amended accordingly, and such averments must be added as will show the title of the new parties (s), and it would seem that liberty to amend and to add parties may be combined in the same order (t). An action instituted by the next friend of a person of unsound mind may, on the subsequent appointment of a committee, be carried on by such committee (u). After a long lapse of time the right to revive is not absolute, but is subject to the discretion of the Court (x). The successor in interest of a counterclaiming defendant may obtain an order to proceed with the counterclaim under this rule (y). In case of a mere money demand the plaintiff will not, on the bankruptcy of a

v. *Pollock*, W. N. 76, p. 250; *Darcy v. Whittaker*, W. N. 76, p. 17; *Dyer v. Painter*, W. N. 81, p. 105. By Order 43, r. 18, it is provided that the functions of the order of course officers are to be discharged by the Registrars.

(o) *Jameson v. Marshall*, 46 L. T. 480.

(p) For the former practice relating to revivor which remains substantially the same, see *Daniell's Ch. Pr.*, chap. 33.

(q) *Ranson v. Patten*, 17 Ch. D.

767.

(r) *Burstall v. Fearon*, W. N. 83, p. 99; 31 W. R. 581.

(s) *Seear v. Lawson*, 16 Ch. D. 121; *Miller v. Huddleston*, W. N. 81, p. 171.

(t) *Ashley v. Taylor*, 10 Ch. D. 768.

(u) *Green v. Pratt*, 48 L. J. Ch. 681.

(x) *Curtis v. Sheffield*, 20 Ch. D. 401.

(y) *Andrew v. Aitken*, 21 Ch. D. 175.

sole defendant, be allowed to join the trustee in bankruptcy as defendant (z). Where the original plaintiff's successor in title omits to obtain an order of revivor, the defendant should apply for an order that he prosecute the action within a limited time, or that the action be dismissed without costs (a). In case of the death of a sole plaintiff the defendant may, if there is no personal representative, apply for the appointment of one under Order 16, r. 46, (which replaces sect. 44 of the Chancery Procedure Act,) and then, by separate application, move to dismiss (b). The original plaintiff's personal representatives, on obtaining an order of revivor, become personally liable for costs (c), so, too, does the trustee in bankruptcy of a defendant, if he proceeds with the defence, even though he deliver no pleadings (d).

The order must be served on the continuing parties or their solicitors, and on the new parties personally, unless the person obtaining the order is the only new party, and will be binding on all parties served with it, except infants, or persons of unsound mind not so found by inquisition, who have no guardian *ad litem* appointed in the action, from the date of service. The order may be served out of the jurisdiction (e).

Any person served with the order who is *sui juris*, or a married woman, or who is an infant, or person of unsound mind, with a guardian *ad litem* appointed in the

Order 17, r. 5.
Service of
order.

Order 17, r. 6.
Application
to vary or dis-
charge order.

(z) *Barter v. Debeux*, 7 Q. B. D. 418.

(a) *Motion v. King*, 29 W. R. 73.

(b) *Wingrove v. Thompson*, 11 Ch. D. 419.

(c) *Boynton v. Boynton*, 9 Ch. D. 250; 4 App. C. 733.

(d) *Watson v. Holliday*, 20 Ch. D. 780.

(e) *Jameson v. Marshall*, 46 L. T. 480.

r. 7.
By infant
or person of
unsound mind.

action, may apply to the Court or the Judge in Chambers, within twelve days from service, for an order varying or discharging the order, while any infant or person of unsound mind, who has not, at the date of service, a guardian *ad litem* appointed in the action, may make a similar application, within twelve days from the time when a guardian *ad litem* is appointed (*f*), till the expiration of which time the order will have no effect against him.

Order 17, r. 5.
Appearance
by party
served with
order.

Any person served with the order must, if not already a party to the action, appear in the action, within the same time and in the same manner, as if he had been served with a writ of summons instead of an order (*g*). Default of appearance by the trustee in bankruptcy of a defendant who had himself appeared and pleaded before bankruptcy will not render it necessary to file the pleading and notice of trial, the effect of the order of revivor being to place the trustee in the exact position of the original defendant (*h*).

Order 17, rr.
9, 10. Cer-
tificate of
abatement.

When any cause or matter becomes abated, or in case of any change of interest, such as above provided for, the solicitor for the plaintiff, or other party having the conduct of such cause or matter, must certify the fact to the proper officer, who will make an entry to that effect in the cause book, and at the end of a year from the date of entry it will be struck out.

Order 17, r. 8.
Default of
revivor.

Where, on the death of a plaintiff or defendant, the person who is entitled to proceed with the action, cause,

(*f*) As to the appointment of guardians *ad litem*, see *ante*, pp. 6, 19.

(*g*) As to appearance to a writ,

see *ante*, p. 15.

(*h*) *Chorlton v. Dickie*, 13 Ch. D. 160.

or matter fails to do so, the defendant, or other person against whom the cause or matter may be continued, may apply by summons to compel the plaintiff, or other person entitled to proceed with it, to do so within such time as may be ordered, and in default may obtain judgment, and issue execution by leave of the Court or Judge.

CHAPTER XLI.

PROCEEDINGS IN DISTRICT REGISTRIES.

Order 5, r. 1. THE plaintiff, wherever resident, may issue a writ out
Issue of writ. of any District Registry.

Order 12, rr. Where the writ is issued out of a District Registry,
4, 5. Appearance to writ. any defendant who is resident, or carries on business, within the District must, as we have seen (a), appear there, while any defendant not resident, or carrying on business, within the District, may appear either in the District Registry or in London.

Order 12, rr. If all the defendants appear in the District Registry,
6, 7. Proceedings in District Registry. the action, unless removed, will proceed there, but if any defendant appears in London it will, unless otherwise ordered, proceed in London.

Order 12, r. 7. The plaintiff may, if he can show that the defendant,
Appearance in London. appearing in London, is a mere formal defendant, or has no substantial cause to interfere with the conduct of the cause, obtain an order from the Court, or the Judge in Chambers, that the action may proceed in the District Registry, notwithstanding the defendant's appearance in London.

Order 35, rr. Any defendant may, at any time after appearance,
13, 14.

(a) *Ante*, p. 15.

but before delivering his defence, obtain the removal of the action from the District Registry to London, by serving on the other parties to the action, and delivering to the District Registrar, a notice, signed by himself, or his solicitor, to the effect that he desires the action to be removed to London, and it will be removed accordingly.

Removal of action to London.

The plaintiff may, on showing that the defendant, serving notice of removal, is a mere formal defendant, or has no substantial cause to interfere with the conduct of the action, obtain an order from the Court, or the Judge in Chambers, that the action may proceed in the District Registry, notwithstanding the notice of removal.

Order 35, r. 14. Action ordered to proceed in District Registry notwithstanding notice of removal.

Any party to the action may obtain from the District Registrar, or from the Court or the Judge in Chambers, an order to remove the action from the District Registry to London, on such terms as seem just, on showing that there is sufficient reason for doing so. The action may be set down in the District Registry for trial in London, on application to the District Registrar, without any order for removal (b).

Order 35, r. 16. Action removed to London by order.

Any party to an action proceeding in London may obtain an order from the Court, or the Judge in Chambers, to remove the action from London to any District Registry, on such terms as seem just, on showing that there is sufficient ground for doing so.

Order 35, r. 17. Action removed to District Registry by order.

On the removal of any action from a District Registry to London, the defendant must give notice to the plain-

Order 35, r. 18. Address for service.

(b) *Lumb v. Whiteley*, W. N. 77, p. 40; *Birmingham Waste Co. v. Lane*, W. N. 76, p. 50; 24 W. R. 292; but see *Walker v. Robinson*, W. N. 75, p. 245; 24 W. R. 137.

tiff of an address for service in London in the same way as if he had originally appeared there (c).

Order 35, r. 20. Documents transmitted to London on removal.

Where the defendant appears in London to a writ issued out of a District Registry, or on the removal of any action from a District Registry to London, all original documents, if any, filed in the District Registry, and a copy of all entries in the books of the District Registry of any proceedings in the action, must be transmitted by the District Registrar to London.

Order 19, rr. 19, 21. Filing in District Registry.

While the action proceeds in the District Registry, all pleadings and documents which require filing must be filed there (d), except certificates of the Chief Clerk and Taxing Officer's affidavits and other documents (required to be filed) used before the Judge in Chambers, or any Taxing Officers or Referee, and not already filed in the District Registry, which must be filed in the Central Office, copies being transmitted to the District Registry, if the Court or Judge in Chambers so direct.

Order 35, r. 1. Proceedings in District Registry.

Where the action proceeds in the District Registry, all proceedings must be taken there, down to, and including, the entry of final judgment, unless otherwise provided by rules of Court, or otherwise ordered by the Court or Judge in Chambers, and every final judgment and order for an account by reason of the default of the defendant, or by consent, must be entered in the District Registry in the same way as judgments and orders in actions proceeding in London are entered in the Central Office. An order for account, under Order 15, may be

(c) *Ante*, p. 15.

(d) Where the defendant makes default in appearance, all plead-

ings may be delivered to him by filing them in the District Registry, *ante*, p. 20.

made, it seems, by a District Registrar (*e*), or an order dismissing an action for want of prosecution (*f*). It has been held, however, that District Registrars cannot make a decree, even by consent (*g*), and that they cannot appoint a receiver, or direct banking accounts to be opened, or money to be paid in to those accounts (*h*), or take accounts or inquiries directed by a judgment pronounced by the Court, unless specially directed to do so by the judgment (*i*). In partition actions the usual inquiries may be taken in the District Registry, but the application for sale must be made to the Judge in Chambers (*k*). Though a sale of real estate under a judgment may be ordered to take place in a District Registry, the Court of Appeal will not interfere with the discretion of the Court below, where such an order has been refused, even where all parties desire a sale in the District Registry (*l*). Taxation of costs will not be ordered to proceed in the District Registry, except under very special circumstances (*m*).

Restricted
powers of
District
Registrars.

Sale of real
estate in
District
Registry.

Taxation of
costs.

Where any judgment, or order, made in an action proceeding in a District Registry is directed to be entered

Order 35, r. 3.
Entry in
London.

(*e*) *Bennett v. Bowen*, 20 Ch. D. 538; but see and consider cases cited in note (*g*).

(*f*) *Foster v. Edwards*, 48 L.J.Q. B. 767.

(*g*) *Brassington v. Cussons*, 24 W. R. 881; *Irlam v. Irlam*, 2 Ch. D. 603, which case, though decided on the original rule, and not on the rule now in force, was recognised as an authority in the case of *Hutchinson v. Ward*, 6 Ch. D. 692.

(*h*) *Hutchinson v. Ward*, 6 Ch. D. 692; *Robertson v. Copper*, W.

N. 78, p. 66; 26 W. R. 434; and see *Finlay v. Davis*, 12 Ch. D. 735.

(*i*) *Irlam v. Irlam*, 2 Ch. D. 608; *Hutchinson v. Ward*, 6 Ch. D. 692; *Bennett v. Bowen*, 20 Ch. D. 538.

(*k*) *Sykes v. Schofield*, 14 Ch. D. 629.

(*l*) *Macdonald v. Foster*, 6 Ch. D. 193.

(*m*) *Day v. Whittaker*, 6 Ch. D. 734.

in London, an office copy of the judgment or order must be transmitted to the District Registry, and must be filed there.

Order 35, r. 5.
Exclusive jurisdiction. Where the action is proceeding in a District Registry, leave to enter judgment against third parties, or issue or renew writs of execution, and orders for examination for garnishee purposes, and garnishee orders and charging orders *nisi*, must be obtained from the District Registrar, unless otherwise ordered.

Order 35, r. 4.
Taxing costs. Where final judgment is entered in the District Registry, the costs must be taxed there, unless otherwise ordered by the Court or Judge (o).

Order 35, r. 4.
Issue of execution. Any writ of execution to enforce an order or judgment in an action proceeding in a District Registry must issue out of the District Registry, unless otherwise ordered by the Court or Judge.

Order 35, r. 6.
Order 54, r. 12. Limited jurisdiction. District Registrars have the same jurisdiction as a Judge in Chambers, except such jurisdiction as the Common Law Masters are precluded by the Judicature Rules from exercising, viz., jurisdiction in respect of the liberty of the subject, granting leave for service out of the jurisdiction, the transfer of actions, the settlement of issues otherwise than by consent, inspection, and other orders under Order 50, rules 1 to 5, injunction, *mandamus* and receiver, awarding costs in proceedings not before themselves, reviewing taxation of costs, charging orders, and acknowledgments of married women. When a motion has been made to the Court, the jurisdiction of the District Registrar is at an end, and the

(o) But see and consider *Day v. Whittaker*, 6 Ch. D. 193.

action becomes *ipso facto* removed from the District Registry (*p*).

Applications to District Registrars must be made by summons, and, if the matter is one proper for the decision of the Judge, the application may be referred by the District Registrar to the Judge to whom the action is assigned, who may either dispose of it, or refer it back to the Registrar with any direction which he may think fit.

Order 35, rr. 7, 8. Applications to District Registrar to be by summons.

Any person, affected by any order or decision of the District Registrar, may appeal to the Judge to whom the action is assigned, and the appeal must be effected (without a fresh summons (*q*)) by an endorsement on the summons by the Registrar at the request of the party, or by notice in writing to attend before the Judge, within six days from the time when the appellant first had notice of the order or decision complained of, or within such further time as may be allowed by the Judge or the District Registrar. An appeal will lie from an order or decision in respect of matters in which the District Registrar only had jurisdiction by virtue of consent. An appeal will also lie as to costs (*r*).

Order 35, r. 9. Appeal from District Registrar.

An appeal from an order or decision of a District Registrar will not operate as a stay of proceedings, unless it is so ordered by the Judge or the District Registrar.

Order 35, r. 10. Appeal no stay of proceedings.

District Registrars are subject to the orders and direction of the Court or Judge, like any other officers

Order 35, r. 11. Control of Court or Judge.

(*p*) *Dyson v. Pickles*, W. N. 79, p. 12; 27 W. R. 376.
(*q*) Hitherto a fresh summons

has been necessary.
(*r*) *Foster v. Edwards*, 48 L. J. Q. B. 767.

of the Court, and every proceeding in the District Registry is as much under the control of the Court, as a like proceeding in London.

Order 35, r. 23.
Payment to
Treasury.

Every District Registrar must account for, and pay over to the Treasury, all moneys paid into Court at his Registry, in such manner and at such time as the Treasury may direct. It would seem, however, that it is improper for the District Registrar to open accounts, and that moneys paid in to an account, in pursuance of his order only, will be paid in at the personal risk of all parties, the District Registrar included (s).

(s) *Hutchinson v. Ward*, 6 Ch. D. 735.
D. 692; *Finlay v. Davis*, 12 Ch.

CHAPTER XLII.

ENFORCING THE EXECUTION OF JUDGMENTS
AND ORDERS.

WHERE any judgment or order directs the payment Order 42, r. 1.
Demand un-
necessary. of money, or delivery, or transfer, of any real or personal property by one person to another, it may be enforced without any preliminary demand upon being duly served.

Judgment for the payment of money to any person Order 42, r. 3.
Payment to
individuals. may be enforced in the same way, as it could have been enforced, in any Court, before the passing of the Judicature Acts, save that no subpœna for the payment of costs, and (except by leave), no sequestration to enforce payment of costs shall be issued (a). Default in payment of costs does not authorise attachment for contempt, but the party making default must be proceeded against under the Debtors Act, 1869 (b).

Judgment for the payment of money into Court may Order 42, r. 4.

(a) In Chancery such a judgment has been enforced by a writ either of sequestration or attachment, and also on the expiration of a month from entry of judgment by a writ of *fieri facias* or

elegit, see Daniell's Ch. Pr., where the subject is fully treated.

(b) *Esdaile v. Visser*, 13 Ch. D. 421; and see *Jackson v. Mawby*, 1 Ch. D. 86; *Micklethwaite v. Fletcher*, 27 W. R. 793.

Payment into Court. be enforced by writ of sequestration, or by a writ of attachment, where attachment is authorised by law (c); it may also, it would seem, be enforced by the appointment of a receiver and an injunction (d), or by an order against the bankers of the judgment debtor for payment of any balance due to him into Court (e). Applications for leave to issue writ of sequestration should be made in Chambers (f).

Order 42, r. 5. Recovery of land. Judgment for the recovery, or delivery of possession, of land may be enforced by a writ of possession. An order for foreclosure absolute is not within the rule, so as to entitle the plaintiff to a writ of possession (g). The old writ of assistance is now obsolete (h).

Order 42, r. 6. Order 48. Recovery of property. Judgment for the recovery of any property, other than land or money, may be enforced by a writ of delivery, attachment, or sequestration.

Order 50, r. 11. Writ of injunction. No writ of injunction shall be issued, but an injunction shall be by judgment or order, which shall have the effect of a writ of injunction.

Order 42, r. 7. Mandamus or injunction. A *mandamus* or injunction may be enforced by writ of attachment, or by committal. Attachment may be ordered on a motion to commit for contempt (i), but an order giving leave to issue a writ of attachment will not enable committal on a subsequent *ex parte* application (k).

(c) As to which, see the Debtors Act, 1869, s. 4.

(d) *Stanger Leathes v. Stanger Leathes*, W. N. 82, p. 71.

(e) *Miller v. Huddleston*, 52 L. J. Ch. 208.

(f) *Snow v. Bolton*, 17 Ch. D. 433.

(g) *Wood v. Wheeler*, 22 Ch. D.

281.

(h) *Hall v. Hall*, 47 L. J. Ch. 680.

(i) *Piper v. Piper*, W. N. 76, p. 202; but see *Buist v. Bridge*, W. N. 80, p. 176; 43 L. T. 432, where this decision is questioned by Jessel, M.R.

(k) *Buist v. Bridge*, *supra*.

No writ of attachment can be issued without leave of the Court or the Judge in Chambers, and notice of the application must be given to the person whom it is sought to attach; but service of notice of motion on the solicitor (*l*), or at the residence (*m*) of the person sought to be attached, will be sufficient notice to the party himself. It would seem that a motion for attachment will not lie until the order, even though made in Chambers, has been drawn up (*n*). The order will not, it seems, be made on summons (*o*). The Court of Appeal will not, it seems, lightly interfere with the discretion of the Court below as to attachment (*p*). The costs of attachment, which are in the discretion of the Court, must be asked for on the hearing of the application (*q*).

Order 44, rr. 1,
2. Writ of
attachment.

Costs of
attachment.

Any person to whom money or costs are payable under a judgment, may at once (*r*) issue one or more writs of *fiери facias*, or *elegit*, to enforce payment, unless a time for payment is mentioned in the judgment, in which case execution cannot issue till the expiration of the period allowed for payment; but, though separate writs may issue for money and costs, a second writ can only be for costs, and must issue within eight days after the issue of the first writ. The Court, at the time of giving judgment, or

Order 42, rr.
17, 18.
Payment of
money or
costs enforced
by *ft. fa.* or
elegit.

(*l*) *Browning v. Sabin*, 5 Ch. D. 511; *Richards v. Kitchen*, W. N. 77, p. 128; but see *contra*, *Mann v. Perry*, W. N. 81, p. 4.

(*m*) *Re A Solicitor*, 14 Ch. D. 152; and see *Tilney v. Stansfield*, W. N. 80, p. 77; 28 W. R. 582.

(*n*) *Ballard v. Tomlinson*, W. N. 83, p. 90.

(*o*) *Knight v. Gardiner*, W. N. 83, p. 162.

(*p*) *Jarman v. Chatterton*, 20 Ch. D. 493.

(*q*) *Abud v. Riches*, 2 Ch. D. 528.

(*r*) Under the old practice, a writ of *fiери facias* or *elegit* could not issue till a month had elapsed from entry of judgment.

the Court or Judge in Chambers, subsequently, may give leave to issue execution before entry of judgment, or before the expiration of the time allowed for payment, or may stay execution for any length of time beyond either of those periods.

Order 43, r. 1.
Writ of *fi. fa.*
or *elegit*.

Writs of *fi. fa.* and *elegit* have the same force, and are executed in the same way, as before the passing of the Judicature Acts, and any writs which could then have been issued in aid of them, may still be issued and executed. Where any party in whose favour judgment has been given is unable, in consequence of an outstanding legal estate, to obtain actual delivery of the land of the debtor, he may now, in the same action, obtain equitable execution by the appointment of a receiver (s).

Order 42, r. 19.
Period for
execution.

Any party who has obtained any judgment or order (other than a judgment for payment of money or costs, or recovery of land) cannot issue execution till the expiration of fourteen days, except by leave of the Court or Judge.

Order 43, r. 6.
Issue of
sequestration
without leave.

Where a judgment, directing payment into Court, or any other act, within a limited time, is disobeyed after being duly served, the person obtaining the judgment may, on the expiration of the time limited for the performance of the act directed, without any order for the purpose being necessary, issue a writ of sequestration against the estate and effects of the person disobeying

(s) *Anglo-Italian Bank v. Davies*,
9 Ch. D. 275; *Smith v. Cowell*, 50
L. J. Q. B. 38; *Ex parte Evans*,

11 Ch. D. 691; 13 Ch. D. 252;
and see *Bryant v. Bull*, 10 Ch. D.
153.

the judgment, and the writ will have the same effect, and the proceeds will be dealt with in the same way, as would have been the case in the Court of Chancery before the passing of the Judicature Acts (*t*). An order for payment of money by instalments under the Debtors Act, 1869, is within the rule, and will enable sequestration to issue (*u*).

Any person in whose favour judgment for any relief is given, subject to the fulfilment of any condition or contingency, cannot, on its fulfilment, issue execution, except by leave of the Court or the Judge in Chambers, who may, if necessary, order any question or issue to be determined, before granting leave.

Order 42, r. 9.
Execution on
judgment for
conditional or
contingent
relief.

Where a judgment or order has been obtained on conditions, the party obtaining it will be deemed to have waived or abandoned it if he fail to perform the condition, and any other party may thereupon take such proceedings as the judgment or order warrants, or as might have been taken in the absence of any judgment or order, unless otherwise ordered.

Order 42, r. 2.
Conditional
order.

Where judgment is obtained against a firm, execution may issue against the partnership property, or against any person who has appeared in his own name (*x*), or who is adjudged, or who admits himself, a partner, or against any person served with the writ as a

Order 42, r. 10.
Execution on
judgment
against
partners.

(*t*) Daniell's Ch. Pr.; *Sprunt v. Pugh*, 7 Ch. D. 567. An additional remedy is thus given to persons obtaining judgment for recovery of land. The rule would seem not to apply to injunctions, as not directing an act

to be done.

(*u*) *Willcock v. Terrell*, 3 Ex. D. 323.

(*x*) The old rule did not comprise in express terms partners who appeared in their own name.

partner, who has failed to appear. If execution is desired against any other person, on the ground that he is a member of the firm, leave to issue it must be obtained from the Court or the Judge in Chambers, by whom the question of liability, if disputed, may be ordered to be determined before leave is granted, and till the question of liability has been determined, judgment against the firm is not binding on him so as to constitute a debt on which he can be made bankrupt (*y*). It has been held that where judgment has been obtained against a firm, action on the judgment may be brought against the individual members (*z*).

Order 42, r. 11.
Production of
judgment on
issue of execu-
tion.

No writ of execution can be issued without production of the judgment on which execution is to issue, or an office copy showing the date of entry, to the Clerk of the Judgments Department of the Central Office, or District Registrar, who must be satisfied that the party applying for the writ is entitled to issue immediate execution.

Order 42, r. 12.
Præcipe must
be filed by
party issuing
execution.

The party issuing execution, or his solicitor, must file a *præcipe* for that purpose, containing the title of the action, the reference to the record, the date of the judgment and of the order, if any, directing execution to issue, and the names of the persons or firm against whose goods execution is to issue; and the *præcipe* must be signed by, or on behalf of, the solicitor of the party issuing execution, or by the party issuing it, if he do so in person (*a*).

(*y*) *Ex parte Young*, 19 Ch. D.
124.

(*z*) *Clarke v. Culley*, 9 Q.B.D. 355.

The writ must be dated the day of issue, and must be indorsed with the name and address of the solicitor actually suing it out, and also, if he acts as agent only, with the name and address of the solicitor for whom he acts; or if the writ has been sued out by the party in person, it must be indorsed with a memorandum to that effect, containing the address of such party. The writ must also be indorsed with directions to the sheriff, or other officer or person to whom it is directed, to levy the money due, stating the amount, and also to levy interest, if sought to be recovered, at the rate of four per cent. from the entry of judgment, or at such rate as the parties agreed on.

Order 42, rr. 13, 14. Writ of execution to be dated and indorsed with address.

r. 16. And with directions to sheriff.

The party issuing execution may levy the poundage fees and expenses of execution, in addition to the sum recovered by the judgment.

Order 42, r. 15. Expenses of execution may be levied.

A writ of execution will, if left unexecuted, only remain in force for a year from issue; it may, however, be renewed, by leave of the Court or the Judge in Chambers, for another year, at any time before it expires, as, also, may any renewed writ of execution; and production of the writ, properly sealed, will be sufficient evidence of its renewal.

Order 42, r. 20. Duration and renewal of writ of execution.

r. 21. Renewal evidenced by sealing.

Execution may issue, as between the original parties, at any time within six years from the recovery of judgment.

Order 42, r. 22. Time for issue of execution.

When six years have elapsed since the date of the judgment or order, or a change, by death or otherwise, has taken place in the parties entitled, or liable, to execution, or where a husband is entitled, or liable, to

Order 42, r. 23. Leave to issue execution on change of parties.

execution on a judgment or order against his wife, or a party is entitled to judgment on assets *in futuro*, or against shareholders, in respect of a judgment against a company, execution can only be issued by leave of the Court or the Judge in Chambers, which leave may be granted (on an *ex parte* application (c)) at once, or, if necessary, any question or issue may be ordered to be first determined, in either of which cases the order may be made on such terms, as to costs and otherwise, as the Court or the Judge in Chambers may think just.

Order 42, r. 24. Orders made by the Court or a Judge in Chambers may be enforced in the same way as judgments.
Orders enforceable like judgments.

Order 42, r. 26. Any order made against, or in favour of, any person who is not a party to the action, may be enforced in the same way as if the party against whom, or in whose favour, the order was made, were a party to the action.
Order against or in favour of person not a party.

Order 42, r. 30. If a mandamus, injunction, or judgment for specific performance is not complied with, the Court or Judge may, instead of, or as well as, attaching the disobedient party, direct the act required to be done by the party obtaining the judgment or order, or by any other person, at the costs of the disobedient party.
Non-compliance with mandamus or injunction.

Order 42, r. 31. Where a judgment or order against a corporation is wilfully disobeyed, it may, by leave of the Court or Judge in Chambers, be enforced by sequestration against the corporate property, or by attachment against the directors or officers of the corporation, or by sequestration against their property.
Corporations.

(c) *Mercier v. Lawrence*, W. N. 78, p. 103; 26 W. R. 506.

If any difficulty arise with reference to the execution or enforcement of any judgment or order, other than for recovery or payment of money, any party interested may obtain an order from the Court, or the Judge in Chambers, for the attendance and examination of any party (*d*). Order 42, r. 33.
Examination.

Any judgment creditor may obtain from the Court, or Judge in Chambers, a charging order on any stock or shares standing in the name of the judgment debtor, or in the name of any person in trust for him, or in which he is interested in remainder or reversion, in the same way as he might have done before the passing of the Judicature Acts, and the order will give him all remedies which he would have had if the charge had been made in his favour by the judgment debtor, except that the charge cannot be enforced till the expiration of six calendar months from the date of the order (*e*). Order 46, r. 1.
Charging
order on stock
or shares.

A charging order can only be given for an ascertained sum, and cannot be given for costs till they have been taxed (*f*). Order only
made for
ascertained
sum or costs.

(*d*) This and the three preceding rules are new.

(*e*) For the practice in respect to charging orders, see Daniell's Ch. Pr. By Order 46, r. 2a *et seq.*, writs of *distringas* are abolished, and notice is substituted, which is to be filed together with an affidavit in the Central Office; and service of an office copy of the affidavit, and a duplicate of the filed notice on the company, or governor

and company, of the Bank of England, will then have the same force as the issue of a writ of *distringas*. The notice in lieu of *distringas* must be followed up by an injunction to restrain the bank from parting with the fund if there are other claimants: *Re Blaksley*, 23 Ch. D. 549.

(*f*) *Widgery v. Tepper*, 6 Ch. D. 364, overruling *Burns v. Irving*, 3 Ch. D. 291.

CHAPTER XLIII.

ATTACHMENT OF DEBTS.

Order 42, r. 32.
Order for examination of judgment debtor as to debts.

WHERE judgment is given for payment of money, the judgment creditor may obtain an order from the Court, or the Judge in Chambers, for the oral examination, before an examiner of the Court, or a special examiner, of the judgment debtor, or in the case of a corporation, of any officer thereof, as to what debts are owing to the debtor, and for the production by him of any books or documents. The examination may take the form of the severest cross-examination (a).

Order 45, r. 1.
Order nisi for attachment of debts may be obtained *ex parte*.

The judgment creditor may, either before, or after, examination of the judgment debtor, on an *ex parte* application, supported by an affidavit, showing that judgment has been recovered and is still unsatisfied, and to what amount, and also showing that some person within the jurisdiction is indebted to the judgment debtor, obtain from the Court, or the Judge in Chambers, an order *nisi* for the attachment of all debts owing, or accruing, from the person named in the affidavit (who is called the garnishee) to the judgment debtor. It has been held that an order dismissing an action with costs,

(a) *Republic of Costa Rica v. Strousberg*, 16 Ch. D. 8.

for want of prosecution, is not a judgment within the meaning of this order, so as to authorise attachment of debt (*b*). A garnishee order may be made against a receiver in an administration action (*c*). A garnishee order cannot be made against a firm (*d*). A debt capable of attachment will not be created by service on the judgment debtor of a notice to treat, by a company, under the Lands Clauses Consolidation Act (*e*), even though the purchase money has been assessed by a jury (*f*).

Service or notice to the garnishee of an order *nisi* for attachment of debts will bind the debts in his hands; but it has not the effect of transferring the debt and its securities (*g*).

Unless the garnishee, on service or notice of the order *nisi*, pays the amount due from him to the judgment creditor, or an amount equal to the judgment debt, into Court forthwith, or disputes the debt, or if he does not appear upon summons, the Court, or the Judge in Chambers, may order execution to issue at once against the garnishee; but if the garnishee disputes his liability, the question of liability may be ordered to be determined before ordering execution to issue.

Where the garnishee alleges that the debt belongs to, or is subject to a lien or charge in favour of, a third party having

Order 45, r. 2.
Service of
order on
garnishee.

Order 45, rr.
3, 4. Execu-
tion against
garnishee.

Order 45, rr.
5, 6. Third
party having

(*b*) *Cremetti v. Croom*, 4 Q. B. D. 225; but see *contra*, *Nott v. Sands*, W. N. 83, p. 74.

(*c*) *Rapier v. Wright*, 14 Ch. D. 638.

(*d*) *Walker v. Rooke*, 6 Q. B. D. 681.

(*e*) *Richardson v. Elmit*, 2 C. P. D. 9.

(*f*) *Howell v. Metropolitan Ry. Co.*, 19 Ch. D. 508.

(*g*) *Chatterton v. Watney*, 17 Ch. D. 259.

claim on debt
ordered to
appear.

person, the third person may be ordered to appear and state the nature and particulars of his claim on the debt, and, after hearing him, or on his failing to appear, execution may be ordered to issue, or any preliminary question may be ordered to be tried, or any other order may be made, on such terms, with respect to the lien or charge and costs, as the Court or Judge thinks just and reasonable. Where there are claims by third parties on the debt, the order ought not to be made absolute, even though the garnishee does not allege or admit their claims; but the money ought to be brought into Court, and an issue directed (*h*).

Order 45, r. 7,
Garnishee dis-
charged by
payment or
levy of execu-
tion.

Payment by, or execution levied upon, the garnishee will be a valid discharge to him, as against the judgment debtor, for the amount paid or levied, even though the proceedings for attachment are set aside, or the judgment is reversed.

Order 43, r.
34. Costs of
attachment in
discretion of
Court.

The costs of any application for attachment of debts, or of any proceedings incidental thereto, are in the discretion of the Court or the Judge in Chambers. Where a garnishee order is issued without first applying to the judgment debtor for payment, the party obtaining it will be ordered to pay all the costs of the garnishee proceedings (*i*).

(*h*) *Roberts v. Death*, 8 Q. B. D.
319.

(*i*) *Nott v. Sand*, W. N. 83, p. 74.

CHAPTER XLIV.

COSTS.

SUBJECT to the provisions of the Judicature Act and ^{Order 65, r. 1.} Rules, the costs of and incident to all proceedings in ^{Discretion as} to costs. the Supreme Court, including the administration of estates and trusts, are in the discretion of the Court or Judge; but executors, administrators, trustees, or mortgagees, who have not unreasonably instituted, or carried on, or resisted any proceedings, are not thereby deprived of any right to costs out of a particular estate or fund which they have hitherto been entitled to (a). Though, ordinarily, either plaintiff or defendant may be ordered to pay costs, even though successful, a successful defendant cannot be ordered to pay costs where the plaintiff has no title to sue (b).

Where several issues in fact and law are raised upon ^{Order 65, r. 2.} a claim or counterclaim, the costs of the respective ^{Distinct} issues. issues will, unless otherwise ordered, follow the event (c).

(a) It will be observed that to entitle executors, &c., to costs, as of right, they must justify their conduct.

(b) *Dicks v. Yates*, 18 Ch. D. 76.

(c) This rule is new, and it will

be necessary, in order to avoid the expense of apportionment of costs, to ask for a direction at the hearing as to the mode of payment where any of the issues are raised unsuccessfully.

Order 65, r. 6.
Mode of
giving security
for costs in
discretion of
Court.

Where any party to an action is ordered to give security for costs, the amount, mode, and time of giving the security is within the discretion of the Court or the Judge in Chambers (*d*). Under ordinary circumstances, the amount of security ordered will be £100 (*e*), but in a proper case as much as £500 (*f*), or even £1000 (*g*), may be ordered to be given; and the security may extend to past as well as future costs (*h*), but the application should be made as promptly as circumstances will admit (*i*). Residence abroad (*k*), or poverty (*l*), are *prima facie* sufficient grounds for ordering security for costs; but the plaintiff will not be ordered to give security for costs on the mere ground that he is living out of the jurisdiction, if he has property of a substantial nature in this country (*m*); nor will one of two co-plaintiffs be ordered to give security for costs on the ground that he is living out of the jurisdiction, if the other plaintiff is within the jurisdiction (*n*). Where a defendant living out of the jurisdiction delivers a counterclaim in respect of the same matters as those on which the statement of claim is founded, he cannot be called upon to give security for costs (*o*). If the defen-

(*d*) *Staples v. Young*, 2 Ex. D. 324.

(*e*) *Paxton v. Bell*, 24 W. R. 1013.

(*f*) *Republic of Costa Rica v. Erlanger*, 3 Ch. D. 62.

(*g*) *Massey v. Allen*, 12 Ch. D. 807.

(*h*) *Brocklebank v. Lynn Steamship Co.*, 3 C. P. D. 385; *Massey v. Allen*, 12 Ch. D. 807.

(*i*) *Re Indian, Kingston, and Sandhurst Mining Co.*, 22 Ch. D.

82.

(*k*) *Grant v. Banque Franco-Egyptienne*, 2 C. P. D. 430.

(*l*) *Harlock v. Ashberry*, 19 Ch. D. 84, and other cases cited *ante*, p. 149, n. (*d*).

(*m*) *Hamburger v. Poetting*, 30 W. R. 769; *Redendo v. Chayter*, 4 Q. B. D. 453, 457.

(*n*) *D'Hormusgee v. Grey*, 10 Q. B. D. 13.

(*o*) *Mapleson v. Masini*, 5 Q. B. D. 144.

dant counterclaims in respect of a distinct matter, he will not be entitled to security from a plaintiff out of the jurisdiction, though he would not, it would seem, by the mere fact of the counterclaim, lose his right to security, if it arose out of the same matter (*p*). The Court of Appeal may (as we have already seen (*q*)), require the appellant, under special circumstances, to give security for costs.

Where a bond is to be given as security for costs, it must, unless otherwise ordered, be given to the party requiring the security, and not to an officer of the Court. Order 65, r. 7.
Security for
costs by bond.

Any party seeking discovery by interrogatories or production of documents, must, as we have seen (*r*), deposit the sum of £5 in Court as security. Order 31, r.
26. Security
on discovery.

Whenever it appears to the Court or Judge that costs have been improperly or unreasonably incurred, or that owing to the default or misconduct of the solicitor any costs properly incurred have proved fruitless to party incurring them, the Court or Judge may call on the solicitor to show cause why he should not repay the same to the client, and make such order as seems just. Order 65,
r. 11.
Default of
solicitor.

No appeal for costs can be entertained by the Court of Appeal unless leave to appeal is given by the Court below (*s*).

(*p*) *Wintfield v. Bradnum*, 3 Q. B. D. 324.

(*q*) *Ante*, p. 149.

(*r*) *Ante*, pp. 84, 91.

(*s*) *Ante*, pp. 155, 156, and cases there cited.

CHAPTER XLV.

TIME.

Order 64, r. 1. **WHERE** the time allowed by the rules, or by any
 Time to be
 computed by judgment or order, for doing any act, or taking any pro-
 calendar ceeding, is limited by months, it must be computed by
 months. calendar months, unless lunar months are expressly
 specified.

Order 64, r. 2. Where a period of less than six days is allowed for
 Sunday, doing any act, or taking any proceeding, Sunday,
 Christmas Day, and Christmas Day, and Good Friday will not be reckoned
 Good Friday, when not in computing the time.
 reckoned.

Order 64, r. 3. Where the time for doing any act, or taking any pro-
 Close of ceeding, expires on Sunday, or on any other day on which
 offices on the offices are closed, it may be done, or taken, on the
 last day. next day on which the offices are open.

Order 64, r. Service of pleadings, notices, summonses, orders, rules,
 11. Time and other proceedings, must be effected before two o'clock
 for service. on Saturdays, and before six o'clock on other week-days,
 or will be deemed to have been effected on the following
 day, or, in case of service on Saturday, on the following
 Monday.

Order 64, rr. No pleadings can be amended or delivered, without
 4, 5. Amend- leave, during the long vacation, nor will the long vaca-
 ment or

tion be reckoned in computing the time for filing, delivery of
amending, or delivering, any pleading, unless expressly pleadings in
directed. long vacation.

Where an order for security has been made and Order 64, r. 6.
served, the time which elapses between service of the Order for
order and the giving of the security will not be reckoned security.
in the computation of time for pleading, answering in-
terrogatories, or taking any other proceeding in the
action (a).

The time for delivering or amending pleadings may Order 64, r. 8.
be enlarged, by consent in writing, without any applica- Order 65, r.
tion to the Court or a Judge in Chambers, and the 24. Enlarg-
costs of any application to the Court or Judge will not ing time by
be allowed unless an application out of Court has been consent.
first made.

The time limited by the rules, or by any order enlarg- Order 64, r. 7.
ing time, for doing any act, or taking any proceeding, Enlarging or
may be enlarged or abridged by the Court, or the Judge abridging
in Chambers, on such terms as the justice of the case re- time.
quires, and may be enlarged, even though it has actually Enlargement
expired at the time when the application is made (b). after time has
expired.

It would seem that, except in the case of extraordinary
delay, it is almost a matter of course to extend the
time for delivering pleadings when a party is out of
time, on his paying the costs of the application (c).
It has been held, that when an order has been made,
dismissing the action if a statement of claim is not

(a) This rule is new.

(b) See *Collins v. Vestry of Pad-*
dington, 5 Q. B. D. 368, where the
principles which ought to guide the
Court in extending time are very

fully discussed by the Court of
Appeal.

(c) *Eaton v. Storer*, 22 Ch. D. 91;
but see *Gilder v. Morrison*, 30 W.
R. 815.

delivered within a week, the time cannot be enlarged after the expiration of the week, as the action is then at an end (*d*). The time for delivering a statement of claim may be enlarged after it has actually expired, where the delay has been caused by a slip, although, but for the writ, the claim would be barred by the Statute of Limitations (*e*).

(*d*) *Whistler v. Hancock*, 3 Q. B. D. 83; *Wallis v. Hepburn*, 3 Q. B. D. 84; *King v. Davenport*, 4 Q. B. D. 402; but see *contra*, *Burke v. Roone*, 4 C. P. D. 226, and *Carter v. Stubbs*, 6 Q. B. D. 116, in which

cases there was an application on the part of the plaintiff to extend the time for appeal, to which the Court attached great weight.

(*e*) *Canadian Oil Works v. Hay*, 38 L. T. 549.

CHAPTER XLVI.

APPLICATIONS IN CHAMBERS.

APPLICATIONS for time to plead, or to amend pleadings, or for discovery and production of documents, and generally all applications relating to the conduct of any action, must be made in Chambers, and it may be laid down as a general rule that wherever it is provided by the rules that the application may be made either to the Court or a Judge, the application should be by summons, as the cheaper method, and that any person applying by motion, in such a case, does so at the risk of being saddled with the extra costs thus occasioned, even though successful (a).

Order 55, r. 2,
sub-a. 17.
Applications
as to
pleadings and
procedure.

Applications under the Judicature Acts and rules, such as above adverted to, form a small part only of the business transacted in Chambers, which is of infinite variety; and it would, perhaps, not be too much to say that any application will, in the first instance, be entertained in Chambers, in the absence of any order, statute, or settled practice, requiring that it should be by motion, there being a growing disposition among the

General
applications.

(a) *Marriott v. Marriott*, 26 W. Ch. D. 138, n. R. 416; *Chesterfield v. Black*, 13

Judges and their chief clerks to adopt the cheaper forms of procedure.

Order 54, r. 24.
Form of
summons.

The summons, which is intituled in the action, directs the parties to attend in Chambers at a specified time, and states the object of, and by whom, the application is made (*b*). It is prepared by the party making the application, or his solicitor, and is sealed by one of the clerks of the Judge to whom the action is assigned, who enters it in "The Summons and Appointment Book," and a copy of the summons must be left by the party obtaining it at the Judge's Chambers.

Order 55, r. 38.
Entry.

Order 54, r. 4.
Service.

An ordinary summons must be served two clear days, a summons for directions four days, and an originating administration summons seven days, before its return.

Hearing of
summons.

Upon the return of the summons the parties must attend in Chambers before the Judge's chief clerk, who, (with few exceptions), hears the application in the first instance, but, in every case, any of the parties are entitled, as a matter of right, to an adjournment to the Judge himself, who may, as he thinks fit, hear the summons in Chambers or adjourn it into Court.

Order 54, r. 9.
Summons may
be comprehen-
sive.

Any party making any application at Chambers, by summons or otherwise, may include, in the same application, all matters as to which he desires an order or directions, and any order or directions relative to or consequential on the subject-matter of such application may be given which may be just, and the application may be adjourned into Court, or from Court to Chambers (*c*).

(*b*) For forms of summons, see
App. No. 31.

(*c*) This rule is new.

Where the summons is not disposed of upon the day of its return, the parties must attend, from time to time, without further summons, at such times as may be appointed.

Order 54, r. 8.
Adjournment.

The Judge may, either on the original or any adjourned hearing of the summons, proceed *ex parte* in the absence of any of the parties, in which case the proceedings will not be reconsidered in Chambers, unless the party failing to attend can explain his absence, in which case he may be required to pay the costs occasioned by his absence, before the proceeding is reconsidered, or the Judge may make any other order as to costs which may seem meet, or if the Judge does not think it expedient to proceed *ex parte*, he may order such amount of costs to be paid by the absent party, or by his solicitor personally, as he thinks reasonable (d).

Order 54, rr.
5, 6.
Order 54, rr.
5, 6, 7.
Absence of
party on
hearing of
summons.

Orders made in Chambers may be directed by the Judge to be drawn up by the Registrar, and will then be entered in the same manner, and the same office, as orders made in open Court (e). It would seem that where it is desired to attach any party for disobedience of an order made in Chambers, the order must be drawn up (f).

Order 55, r. 74.
Drawing up
and entering
order.

Orders simply enlarging time, or giving leave for the issue of any writ (other than attachment), or for amendment, need not be drawn up unless specially

Order 52, r. 14.
Orders for
extension of
time.

(d) The power to punish a party or his solicitor for their absence is new, and seems unlimited.

of Orders, see *ante*, p. 133.

(e) As to drawing up and entry

(f) *Ballard v. Tomlinson*, W. N. 83, p. 90.

ordered, but a note of the order, signed by the Judge, chief clerk, or District Registrar, will be a sufficient authority.

Motion to discharge order.

Any party to the summons may give notice of motion before the Judge sitting in Court to discharge the order, as soon as it has been drawn up and entered. Under ordinary circumstances such notice should be given within twenty-one days, but the Judge can, on special grounds, enlarge the time at his discretion (*g*).

Appeal from order.

Any party wishing to appeal from an order made in Chambers should inform the Judge, so that he may either adjourn the case into Court, or deliver a judgment enabling the Court of Appeal to understand the reasons of the decision, but a certificate that the Judge requires no further hearing is not necessary to enable an appeal, if this can be shown *aliunde* (*h*). The usual course would seem to be to adjourn the summons into Court for argument or judgment, or move to set aside the order, wherever an appeal is desired (*i*), but this practice does not prevail before all the Judges (*k*).

(*g*) *Dickson v. Harrison*, 9 Ch. D. 243; *Dickson's case*, 12 Ch. D. 298; but see and consider *Heaily v. Newton*, 19 Ch. D. 326, as to the time from which the twenty-one days runs.

(*h*) *Thomas v. Elsom*, 6 Ch. D.

346.

(*i*) *Holloway v. Cheston*, 19 Ch. D. 516; *Manchester Val de Travers Paving Co. v. Slagg*, 47 L. T. 556.

(*k*) *Anderson v. Butler's Wharf Co.*, 21 Ch. D. 131.

CHAPTER XLVII.

ORIGINATING ADMINISTRATION SUMMONS.

ANY person who would be entitled to bring an ^{Order 55, r. 3.} ^{Parties.} action for the administration of the real or personal estate of a deceased person, or the execution of a trust (a), may obtain an order for such administration by means of an originating summons, or may, without an order for the administration of the estate or trust, obtain, by such summons, the determination of any of the following questions or matters:—

- (a.) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or cestui que trust:
- (b.) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others:
- (c.) the furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts:
- (d.) the payment into Court of any money in the hands of the executors or administrators or trustees:

(a) This seems to be the short effect of the rule.

- (e.) directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees :
- (f.) the approval of any sale, purchase, compromise, or other transaction :
- (g.) the determination of any question arising in the administration of the estate or trust :

Order 55, r. 20. The originating summons must be prepared by the
Issue. applicant, or his solicitor, and sealed in the Central Office, and will then be deemed to be issued, and the party obtaining it must leave a copy at the Central Office for filing.

Order 55, r. 22. If service of the originating summons cannot be
New return. effected within seven clear days of its return, an endorsement may be made upon appointing a new time for the parties not served to attend at Chambers, and service of a copy of the endorsement, stamped for service and sealed at the Judge's Chambers, will have the same force and effect as service of an originating summons, and the hearing may be adjourned to the new time appointed.

Order 55, r. 5. It is sufficient, in the first instance, where the sum-
Respondents. mons is taken out by an executor, administrator, or trustee, to serve any one of the persons interested in the estate, or in the question or matter involved in the summons, or any executor, administrator, or trustee, who does not concur in taking out the summons, or where the summons is taken out by any other person, to serve the executors, administrators, or trustees, but

the Court or Judge may direct service on any other persons.

Any persons served with an originating summons must, before they can be heard, enter an appearance in the Central Office, and give notice of their appearance. Order 55, r. 23.
Appearance.

The summons must be supported by such evidence as the Court or Judge may require, and any directions may be given for the trial of any questions arising thereout, and any judgment may be pronounced which the nature of the case may require, and it shall not be obligatory on the Court or Judge to order administration of the estate or trust if the questions between the parties can be properly determined without such order. Order 55, rr.
7, 8.
Evidence.

CHAPTER XLVIII.

SECT. I.

PROCEEDINGS IN CHAMBERS UNDER JUDGMENT.

Order 55, rr.
28, 32.

Bringing judgment
into
Chambers.

WHERE accounts or inquiries have been directed by the judgment or order, or proceedings of any kind remain to be taken at Chambers, the party entitled to prosecute the judgment, or order, must, within ten days after it is passed and entered, bring an office copy, certified by him to be a true copy of such judgment, or order, as passed and entered, and a note giving the names of the solicitors for the different parties, into the Chambers of the Judge to whom the action is assigned, and if he fails to do so, any other party to the action may bring in the judgment or order, and will thereupon obtain the conduct of the proceedings, unless otherwise ordered.

Order 16, r. 39.
Conduct of
proceedings.

As a general rule the plaintiff is the person entitled to prosecute the judgment or order, but the matter is in the discretion of the Judge, who may, if he thinks proper, give the conduct to any other party. Where the plaintiff has become bankrupt, he is deprived of

the conduct of the action as a matter of course (a). In the case of concurrent actions for administration, the general rule is that the plaintiff who first issued his writ should have the conduct of both actions, without reference to the dates of the respective judgments, but the rule is subject to exceptions (b).

Where, in actions for administration, or for the execution of the trusts of a settlement, a sale of property vested in trustees upon trust for, or with power of, sale, is ordered, the trustees will have the conduct of the sale, unless otherwise ordered.

Order 50, r. 10.
Trustees to have conduct of sale.

Whenever an order for preliminary accounts and inquiries, or an order affecting the rights of persons not parties to the action, has been made in an administration action, the Court, or the Judge in Chambers, may direct service of notice of the judgment or order on any person interested in the estate, and after such notice they will be bound by the proceedings, as if originally made parties, and will be at liberty to attend the proceedings under the judgment or order (c).

Order 16, r. 40.
Service of administration decree.

Persons served with notice of judgment or an order need not obtain an order for liberty to attend the proceedings under it, but will be at liberty to attend, on entering an appearance at the Central Office.

Order 16, r. 41.
Liberty to attend.

As soon as the certified office copy of the judgment or order is left at Chambers, a summons is issued to proceed with the accounts or inquiries directed, and

Order 55, r. 33.
Summons to proceed.

(a) *Dowd v. Hawlin*, 19 Ch. D. 61. Ch. D. 100.

(b) *Mellor v. Swire*, 21 Ch. D. 647; *Townsend v. Townsend*, 23 Ch. D. 100. (c) Under the old rules service was not made in the first instance by order.

upon the return of such summons the Judge, if satisfied that all necessary parties have been served with notice of the judgment or order, gives directions as to the mode in which the accounts and inquiries are to be prosecuted, the evidence to be adduced, the parties to attend, and the time within which each proceeding is to be taken, and a day is appointed for the further attendance of the parties, and such directions may afterwards be varied or added to as may be found necessary.

Order 65, r. 23.
Unauthorised
appearance in
Chambers.

Any party appearing upon any application or proceeding in Chambers in which he is not interested, or which, according to the practice of the Court, he ought not to attend, will not be allowed the costs of his attendance unless the Judge expressly allows them. All parties interested in the matters in question are, it seems, entitled to attend the proceedings in Chambers, as of course; but if they attend without special leave, they will not only be disallowed the costs of their attendance, but may even be ordered to pay any extra costs which their unnecessary attendance has occasioned (*d*).

Order 16, r. 40.
Discharge of
order.

Any person served with notice of the judgment or order may, within a month from the date of service, apply to the Court, or the Judge in Chambers, to discharge, vary, or add to the order.

Order 33, rr.
3, 4.
Account to be
verified by
affidavit.

Where an account is directed by the judgment or order, the accounting party, unless otherwise directed, must verify his account by an affidavit, referring to the

(*d*) *Sharp v. Lush*, 10 Ch. D. D. 830.
468, 473; *Day v. Batty*, 21 Ch.

account as an exhibit, and must leave the account at the Judge's Chambers.

Any party dissatisfied with the account, who desires to dispute its accuracy, must give notice of his intention to the accounting party, pointing out shortly the particulars of his objection (e). Order 33, r. 5.
Notice to dispute account.

Any party may, before the proceedings before the chief clerk are concluded, take the opinion of the Judge on any matter, arising in the course of the proceedings before the chief clerk, without a fresh summons for that purpose; and if he fails, he ought not to be ordered to pay the costs of the adjournment to the Judge (f). Order 55, r. 69. Taking the opinion of the Judge.

The chief clerk, for the purpose of any proceedings directed by the Judge to be taken before him, can issue advertisements, summon parties and witnesses, administer oaths, require the production of documents, take affidavits and acknowledgments, receive affirmations, and, where directed by the Judge, examine parties and witnesses either upon interrogatories, or *visd voce*, as the Judge directs, the attendance of parties and witnesses being compellable in the ordinary manner—witnesses being liable to the ordinary penalties for false swearing. Order 55, rr. 16, 17.
Powers of chief clerk.

(e) And see *Woods v. Oliver*, W. N. 80, p. 51.

(f) *Smith v. Watts*, 22 Ch. D. 5.

SECT II.

CLAIMS.

Order 55, rr.
44, 46, 47.
Advertisement.

Where the persons interested under the judgment or order cannot be ascertained by evidence in the usual manner, it is usual to issue an advertisement inviting them to come forward. The advertisement, which is prepared by the party prosecuting the judgment or order and signed by the chief clerk in token of his approval, must fix a time within which creditors are to send particulars of their claims to the executor or administrator or his solicitor, or, in the case of claimants, other than creditors, must fix a time within which they are to come in and prove their claim, and in the case of all claims by creditors, or otherwise the advertisement must appoint a day for their adjudication, on which day secured creditors are also required to bring in their securities. .

Order 55, rr.
49, 50.

Creditors need
not prove
claims.

Creditors need not produce any evidence, nor attend (except to produce their security) in support of their claim unless served by the executor or administrator with, at least, seven days' notice to attend and prove their claim. If the claim is allowed without proof, notice must be given of its allowance to the creditor.

Order 16, r.
47. Only
executor
entitled to
attend on
adjudication
of claim.

In administration actions, no party to the action, except the executor or administrator, will be allowed to attend, without special leave, either in Court or Chambers, on the adjudication of any claim against the estate,

by any person who is not a party to the action, in respect of any liability, but the Judge may direct, or allow, any other party to the action to appear either instead of, or as well as, the executor or administrator, on such terms, as to costs and otherwise, as seem just. Any party, even the plaintiff, attending unnecessarily will be disallowed his costs (*g*).

If the claims are not all disposed of on the day appointed for adjudication, an adjournment day may be fixed, and, if further evidence is necessary, a time for its close may be fixed, and directions, given as to the mode in which it is to be taken.

No fresh claim will be received after the time fixed by the advertisement, unless special leave is obtained from the Judge on summons, which leave may be granted on such terms and conditions as seem just.

Order 55, rr.
54, 55.
Adjournment
of adjudica-
tion.

Order 55, r.
57. Limit
of time.

SECT. III.

CHIEF CLERK'S CERTIFICATE.

When all the accounts and inquiries have been taken and made and the claims, (if any), adjudicated upon, the result of the proceedings is stated by the chief clerk in the form of a certificate.

Order 55, r.
65. State-
ment of result
of accounts,
&c.

Accounts must not be set out at length in the certificate, but only the result must be stated, by reference to the accounts, which must be filed along with the

Order 55, rr.
66, 68.
Accounts not
to be set out.

certificate; so also the judgment or order, and any documents, evidence, or reasons, on which it is founded must not, except under special circumstances, be set out, but only referred to sufficiently to show upon what the result of the certificate is founded.

Order 55, r.
67.
Form of
certificate.

The certificate, when prepared and settled, will be transcribed in such form, and within such time, as the chief clerk requires, and will be signed by the chief clerk.

Order 55, r.
65.
Judge's signature unnecessary.

It is not necessary that the Judge should sign the certificate (*h*), but when signed by the chief clerk it will be deemed to be approved and adopted by the Judge, unless an order to discharge or vary it is obtained.

Order 55, r.
69.
Taking
Judge's
opinion.

Any party may, before the certificate has been signed, take the opinion of the Judge, upon any matter arising in the course of the proceedings, without taking out a fresh summons, and whatever the result of the adjournment, he will not, it seems, be ordered to bear the extra costs thus occasioned (*i*).

Order 55, rr.
70, 71.
Filing certificate.

When the certificate has been signed, it is transmitted by the chief clerk to be filed at the Central Office, and is thenceforth binding on all parties to the proceedings, unless discharged or varied; under special circumstances the certificate may be discharged or varied on motion or summons after it has been filed.

Order 55, r.
70. Application to discharge.

Applications to discharge or vary the certificate must be made by summons within eight days from the filing

(*h*) Hitherto the certificate has been signed by the Judge.

(*i*) *Smith v. Watts*, 22 Ch. D. 5.

of the certificate. Where the action is ready for hearing ^{charge or} on further consideration, the summons or motion to ^{vary certi-} vary, or discharge, the certificate is invariably adjourned ^{ficat.} to come on for hearing with the action on further consideration.

Where it is desirable that some particular account or ^{Separate} inquiry shall be taken without delay, a separate ^{certificate.} certificate will, in a proper case, be prepared at the request of any of the parties, but, in such case, any question arising out of the result of such separate certificate must be raised by summons or petition, it not being open to the parties to set the cause down on further consideration till the general certificate has been filed (*k*).

(*k*) Daniell's Ch. Pr.

CHAPTER XLIX.

FURTHER CONSIDERATION.

Order 36, r.
21.
Order 55, r.
72.
Time for
setting down.

No action, or originating summons for administration, can be set down on further consideration till after the expiration of eight days from the filing of the chief clerk's certificate, and if not set down by the party having conduct of the action within fourteen days from the date of such filing, it may be set down by any other party.

Order 36, r.
21. Produc-
tion of
written
request, &c.

The action, or matter, is set down on further consideration on production to the Registrar of a written request by the solicitor of the party desiring to set it down, and production of the judgment or order reserving further consideration, or an office copy, and an office copy of the chief clerk's certificate, or a memorandum from the Central Office of the date when the certificate was filed.

Order 36, r.
21. Notice
of setting
down.

The action, or matter, is not to be put in the paper, except by consent, till ten days after it has been set down, and at least six days' notice, previous to its coming into the paper, must be given to the other parties to the action, and to all persons served with the

judgment or order, or who have obtained liberty to attend the proceedings (a).

Orders on further consideration must be made in Chambers, in actions for the administration of an insolvent estate, or of the estate of an intestate, or for the distribution of a fund among creditors or debenture holders (b).

Order 55, r. 2,
sub-s. 16.
When made
in Chambers.

If any party is desirous of using, on the hearing on further consideration, any of the evidence taken before the chief clerk, he must give notice to that effect to the other side, as, according to the settled practice, neither party is entitled to read such evidence on further consideration without previous notice (c). Where an order for accounts has been made under Order 15, any matter required on further consideration as to costs may be proved by affidavit (d). Before the action comes on a copy of the judgment or order, adjourning further consideration, of the chief clerk's certificate, and of any intermediate orders or certificates, must be left with the usher, for the use of the Court.

Notice to use
evidence taken
before chief
clerk.

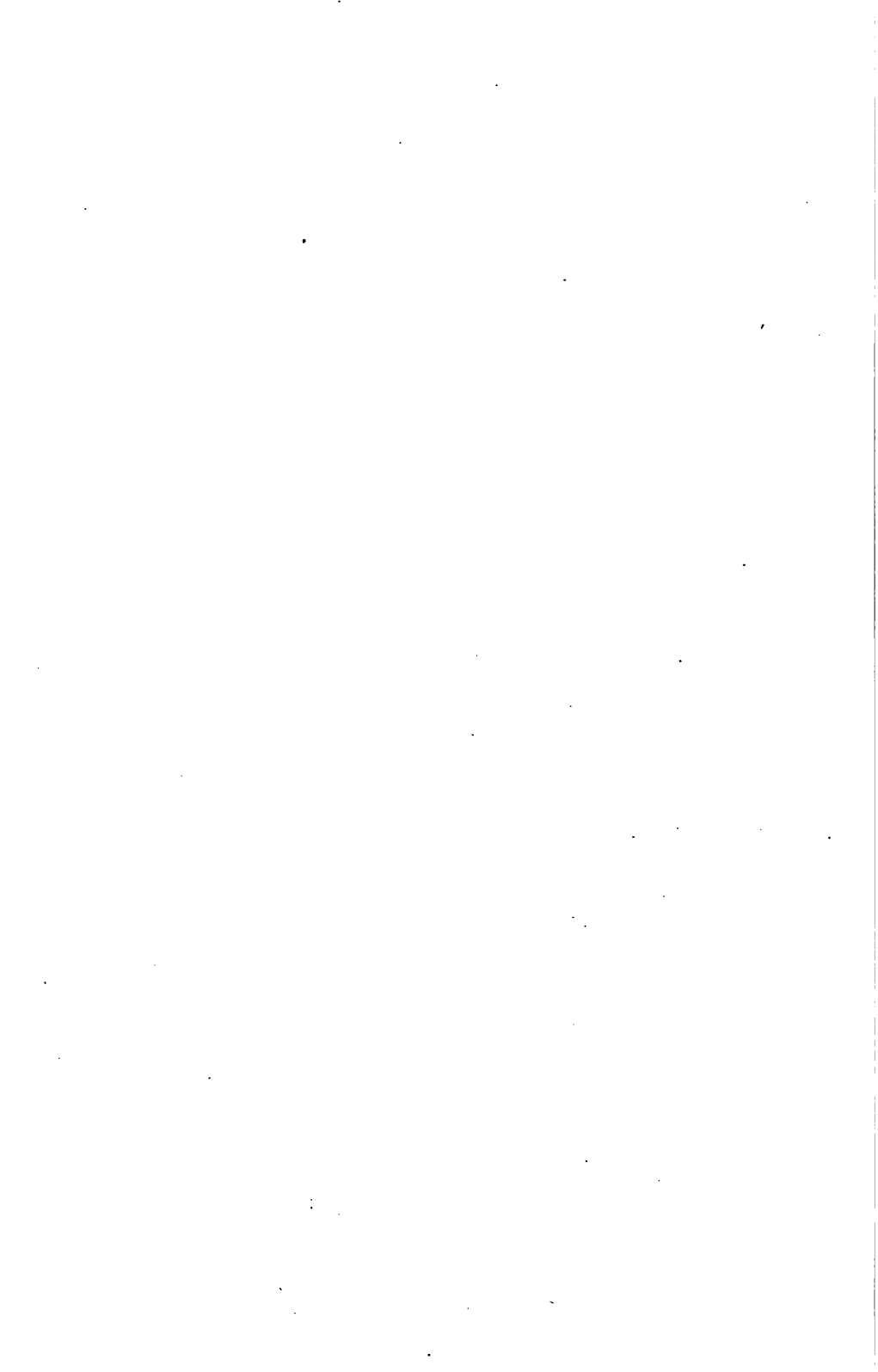
(a) *Rees v. George*, 15 Ch. D. 492, 506.

490.

(b) This rule is new.

(c) *Jones v. Chennell*, 8 Ch. D.

(d) *Beaney v. Elliott*, W. N. 80,
p. 99.



APPENDIX OF FORMS.

188 . [*Here put the letter and number*]. (No. 1.)
 In the High Court of Justice. Writ of
 Chancery Division. summons.

(a).

(In the matter of the estate of *X. Y. Z.*, deceased (b).)

Between *A. B.*, Plaintiff,

and

C. D. and *E. F.*, Defendants.

Victoria, by the Grace of God, &c.

To *C. D.* of , in the county of , and
E. F., of .

We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you, in an action at the suit of *A. B.* ; and take notice that in default of your so doing, the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, &c.

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within 12 calendar months from the date thereof, or, if renewed, within

(a) If the writ is issued out of a District Registry, add here (Manchester) District Registry.

(b) If the action is one for administration, the words in brackets

should, it is presumed, still be added to the title of the writ, though the rules are silent on the point.

6 calendar months, from the date of the last renewal, including the day of such date, and not afterwards.

The defendant (*or defendants*) may appear thereto by entering an appearance (*or appearances*) either personally or by solicitor at the Central Office, Royal Courts of Justice.

(*Or, if the writ is issued out of a District Registry*).

A defendant who resides or carries on business within the above district must enter an appearance at the office of the Registrar of that district.

A defendant who neither resides nor carries on business within the said district may enter appearance either at the office of the said Registrar, or at the Central Office, Royal Courts of Justice, London.

Indorsements to be made on the writ before issue thereof.

The plaintiff's claim is for, &c.

This writ was issued by *E. F.*, of _____, whose address for service is _____, solicitor for the said plaintiff, who resides at _____, or, this writ was issued by *G. H.*, of _____, whose address for service is _____, agent for _____, of _____, solicitor for the plaintiff, who resides at _____, or, this writ was issued by the plaintiff, who resides at (*mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any*).

Indorsement to be made on the writ after service thereof.

This writ was served by me at _____ on the defendant on _____, the _____ day of _____, 18 ____.

(Signed)
(Address)

(No. 2.)
Indorsement

The plaintiff's claim is as a creditor of *X. Y.*, of _____, deceased, suing on behalf of himself and all other creditors,

to have the real and personal estate of the said *X. Y.* administered (and for an account (b)). The defendant *C. D.* is sued as the administrator of the said *X. Y.* (and the defendants *E. F.* and *G. H.* as his co-heirs at law). of writ in creditor's administration action.

The plaintiff's claim is as a legatee under the will, dated the day of , 18 , of *X. Y.* deceased, to have the (real and) personal estate of the said *X. Y.* administered (and for an account (c)) (and for a receiver (d)). The defendant *C. D.* is sued as the executor of the said *X. Y.* (and the said *E. F.* and *G. H.* as his devisees). (No. 3.) Indorsement of writ in legatee's administration action.

The plaintiff's claim is to have an account taken of the partnership dealings between the plaintiff and defendant, under articles of partnership, dated the day of , 18 , and to have the affairs of the partnership wound up (and for a receiver and injunction (e)). (No. 4.) Indorsement of writ in partnership action.

The plaintiff's claim is to have an account taken of what is due to him for principal, interest, and costs, on a mortgage dated the day of , made between (parties), (or by deposit of title-deeds), and that the mortgage may be enforced by foreclosure or sale. (No. 5.) Indorsement of writ in foreclosure action.

The plaintiff's claim is to have an account taken of what, if anything, is due, on a mortgage, dated , and made between (parties), and to redeem the property comprised therein. (No. 6.) Indorsement of writ in redemption action.

(b) If it is desired to proceed by summons under Order 15, the words in brackets should be inserted.

(c) See last note.

(d) If it is desired to move for

a receiver or injunction before delivery of the statement of claim the words in brackets should be inserted. See *Colebourne v. Colebourne*, 1 Ch. D. 690.

(e) See *ante*, note (d).

(No. 7.) The plaintiff's claim is that the sum of £ , which by
 Indorsement of writ in action for raise portions. an indenture of settlement, dated , was provided for the portions of the younger children of , may be raised.

(No. 8.) The plaintiff's claim is to have the trusts of an indenture
 Indorsement of writ in action for execution of trusts of settlement. dated , and made between (*parties*) carried into execution (*and for an account (f)*) (*and for a receiver (g)*).

(No. 9.) The plaintiff's claim is to have a deed dated and made
 Indorsement of writ in action for rectification of deed. between (*parties*) set aside or rectified.

(No. 10.) The plaintiff's claim is for specific performance of an
 Indorsement of writ in action for specific performance. agreement, dated the day of , for the sale by the plaintiff to the defendant of certain (*freehold*) hereditaments at

(No. 11.) [Heading as in Form 1.]
 Writ for service out of the jurisdiction, or for notice in lieu of service out of the jurisdiction.

To C. D., of
 We command you C. D., that within (*here insert the number of days directed by the Court or a Judge ordering the service or notice*) after the service of this writ (*or notice of this writ, as the case may be*) on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Chancery Division of Our High Court of Justice, in an action at the suit of A. B., and take notice that in default of your so doing, the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, &c.

Memorandum and Indorsement as in Form No. 1.

(f) See *ante*, note (b).

(g) See *ante*, note (d).

N.B.—*This writ is to be used where the defendant, or all the defendants, or one or more defendant, or defendants, is or are out of the jurisdiction; when the defendant to the writ to be served is not a British subject, and is not in British Dominions, notice of the writ, and not the writ itself, is to be served upon him.*

[*Heading as in Form 1.*]

(No. 12.)
Notice of writ
in lieu of
service out of
the jurisdic-
tion.

To *G. H.*, of
Take notice that *A. B.*, of , has commenced
an action against you, *G. H.*, in the Chancery Division of
Her Majesty's High Court of Justice in England, by writ of
that Court, dated the day of , A.D. 188 ,
which writ is indorsed as follows (*copy in full the indorse-
ments*), and you are required within days after the
receipt of this notice, inclusive of the day of such receipt, to
defend the said action by causing an appearance to be en-
tered for you in the said Court to the said action, and in
default of your so doing, the said *A. B.* may proceed therein,
and judgment may be given in your absence.

You may appear to the said writ by entering an appearance
personally, or by your solicitor, at the Central Office, Royal
Courts of Justice, London.

(*Or, if the writ is issued out of a District Registry.*)

If you reside or carry on business within the above-
named district, appearance is to be entered at the office of the
Registrar of that district.

If you do not either reside or carry on business within that
district, appearance is to be entered either at the office of the
Registrar, or at the Central Office, Royal Courts of Justice,
London.

(Signed)

A. B., of , &c.

or

X. Y., of , &c.

In the High Court of Justice.

Chancery Division.

Solicitor for *A. B.*

Particulars of the claim:—

Principal due on the bond of the testator (<i>or</i> intestate),					
dated the	of	, 18	.	.	£2000 0 0
Interest from the	of	,			
at 5 per cent.	.	.	.	.	250 0 0
					£2250 0 0

The plaintiff claims to be paid the amount due to him, or to have the real and personal estate of the said *X. Y.* administered.

(Signed)

Delivered

1883. B. No. 233.

(No. 15b.)
Defence.

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

In the matter of the estate of *A. B.*, deceased.

Between *E. F.*, Plaintiff,

and

G. H., Defendant.

Defence.

1. The defendants do not admit the plaintiff's claim.

[*or*]

The defendant, *A. B.*, admits the defendant's claim, but not assets.

[*or*]

The defendant, *C. D.*, admits assets, but not the plaintiff's claim.

2. The claim is barred by the Statute of Limitations.

[*State which.*]

3. Payment was made by deceased.

4. The claim is fraudulent in the following particulars:

[*Set out particulars.*]

5. The defendant is entitled to a set of, of which the following are the particulars:

[*Set out particulars.*]

6. The claim was released by deed dated the
of .

7. Notice was given and assets distributed under Statute
22 & 23 Vict. c. 35, s. 29,

Particulars of the notice.

Advertisements in the *Times* of January 1, 1880.

„ „ *New York Herald*, February, 1881.

„ „ *Bombay Gazette* of January 25, 1881.

[*giving the titles of the newspapers and the dates of those
in which the advertisement appeared.*]

8. The personal estate of the testator is sufficient to pay
the plaintiff his debt if established.

9. The defendant is not heir-at-law or devisee of the deceased.

(Signed) .

Delivered .

(No. 15c.) In the High Court of Justice.
Reply. Chancery Division.

[*Name of Judge.*]

In the matter of the estate of *A. B.*, deceased.

Between *E. F.*, Plaintiff,
and

G. H., Defendant.

Reply.

The plaintiff joins issue with the defendant upon his
defence (*a*).

(No. 16a.) (i). In the High Court of Justice.
Statement of claim for specific performance.
Chancery Division.
[*Name of Judge.*]
Writ issued

1883. A. No. 1.

, 1883.

(*a*) Unless the plaintiff wishes to
introduce fresh matter, there seems
to be now no object in delivering
a reply.

(*i*) This form is not taken from
the schedule to the Act, but is
original.

Between *A. B.*, Plaintiff,
and

C. D., Defendant.

Statement of Claim.

1. By an agreement in writing, dated the 24th of June, 1883, the plaintiff agreed to sell to the defendant a freehold messuage No. , in the county of , for the sum of £ .

2. The defendant refuses to complete the agreement.

3. The plaintiff is, and has always been ready since its execution to perform the said agreement.

The plaintiff claims :—

1. Specific performance of the said agreement of the 24th of June, 1883.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

1883. A. No. 1. (No. 16b.)
Defence and
Counterclaim.

Between *A. B.*, Plaintiff,
and

C. D., Defendant.

Defence and Counterclaim.

1. By the agreement, in the statement of claim mentioned, it was agreed that the defendant should be let into possession of the premises therein comprised on the 1st of September, 1883.

2. Prior to the execution of the said agreement the plaintiff agreed with one *X. Y.*, the then tenant of the premises, whose lease expired on the 24th of June, 1883, for a renewal of his lease for a further term of six months, which rendered it impossible for the plaintiff to deliver up possession to the defendant on the day named in the agreement.

3. The defendant denies that the plaintiff is or ever has been ready and willing or able to perform the said agreement of the 24th of June, 1883.

And by way of counterclaim the defendant repeats paragraph 2 of his defence, and says that he—

1. Has for many years past carried on business at a large profit as a grocer at No. , in the same street, which premises he held under a lease which expired on the 29th of September, 1883, and that not being able to obtain possession from the plaintiff of the said premises on the day named in the agreement, the defendant was obliged, in order to prevent the entire loss of his business, to take a lease at an excessive rent, of premises, of an inferior description to those of the plaintiff, in another neighbourhood, and his business has greatly suffered in consequence.

The defendant claims :—

1. Rescission of the said agreement of the 24th of June, 1883.
2. £ damages for the breach by the plaintiff of the said agreement.

(No. 16c.)
Reply of
plaintiff to
defence and
counterclaim.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

1883. A. No. 1.

Between A. B., Plaintiff,
and
C. D., Defendant.

Reply.

The plaintiff joins issue with the defendant on his defence, and as to the counterclaim, the plaintiff says that :—

1. Prior to the execution of the said agreement of the 24th of June, 1883, the plaintiff informed the defendant that the premises were subject to an agreement with the said X. Y. for a renewal of his lease for a further term of six months, but the defendant, being very anxious to obtain the premises, said that he would purchase them notwithstanding, and would take his chance of being able to buy up the interest of the said X. Y. The defendant also told the plain-

tiff that, as he was certain to come to terms with the said *X. Y.*, no notice of the agreement with him need be taken in the agreement for sale.

The plaintiff does not admit that the defendant was obliged, in order to prevent the entire loss of his business, or from any other cause, to take, or that he did in fact take a lease, at an excessive rent, of premises of an inferior description to those of the plaintiff, in another neighbourhood, nor does he admit that the defendant's business has suffered either greatly or at all in consequence or in fact.

1883. A. No. 1. (No. 16d.)
Rejoinder.

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Rejoinder.

The defendant joins issue with the plaintiff upon his reply to the defendant's counterclaim (*a*).

1883. B. No. 2. (No. 17a.)
Statement of
claim for
specific per-
formance and
damages.

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

Writ issued

, 1883.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

(*a*) Except where it is desired there seems no object in delivering a rejoinder. See *ante*, p. 63.

Statement of Claim.

1. By an agreement in writing, dated the 29th of September, 1881, and made between the defendant of the one part, and the plaintiff of the other part, it was agreed that the plaintiff should restore certain premises at _____, belonging to the defendant and put them in thorough repair, and that on completion of the said repairs the defendant should grant the plaintiff a lease of the said premises for the term of _____ years at the rate of £ _____.

2. The plaintiff on the 1st of October, 1881, entered upon the said premises and commenced work under the said agreement, and duly proceeded with the repairs until the 1st of January, 1882, when the defendant, without assigning any reason for so doing, gave the plaintiff notice to cease working under the said agreement, and obliged him to quit the premises, and the defendant has, since the 1st of January, 1882, up to the present time, refused to allow the plaintiff or his workmen access to the said premises for the purpose of completing the said repairs, though constantly applied to by the plaintiff to do so, or to grant him a lease of the said premises.

3. The plaintiff has expended under the said agreement, sums amounting in the whole to the sum of £ _____, and has also incurred considerable loss through the defendant's, delay in granting him a lease of the said premises.

The plaintiff claims:—

1. Specific performance of the said agreement of the 29th September, 1881.
2. £ _____ damages.

(No. 17b.)
Statement of
defence and
counterclaim
against
plaintiff and
third party.

1878. B. No. 2.

In the High Court of Justice.

Chancery Division.

[Name of Judge.]

Between A. B., Plaintiff,
and

C. D., Defendant
(by original action);

And between the said *C. D.*, Plaintiff,
and
the said *A. B.* and *E. F.*, Defendants
(by counterclaim).

Defence and Counterclaim.

1. The plaintiff covenanted to do the repairs mentioned in the agreement in a proper and workmanlike manner, employing the best materials, and also to use due despatch in their completion, and it was provided that if he should fail in any respect to perform the said agreement, the defendant *C. D.* might thereupon put an end to the agreement by notice in writing.

2. The defendant *C. D.* having discovered, according to the fact, that the work under the agreement was being done so inefficiently, and such bad materials were being used, that the premises would not, when the repairs were finished, be fit for habitation, and that the work was only proceeding at irregular intervals, on the 1st of January, 1882, in pursuance of the power in that behalf in the agreement contained, put an end to the said agreement by notice in writing, after having several times in vain cautioned the plaintiff that he was not carrying out his part of the agreement. Under the above circumstances, but not further or otherwise, the defendant *C. D.* admits that he has obliged the plaintiff to quit the premises, and has since the 1st of January up to the present time refused to allow the plaintiff or his workmen access to the said premises for the purpose of completing the said repairs, or to grant him a lease of the said premises.

3. The defendant *C. D.* denies that the plaintiff has expended under the said agreement sums amounting in the whole to the sum of £ or anything like that amount, or that he has incurred considerable or any loss through the delay of the defendant *C. D.* in granting him a lease of the said premises.

And by way of counterclaim the defendant *C. D.* repeats paragraphs 1 and 3 of his defence, and states as follows:—

1. On the same 29th of September, 1881, the defendant *E. F.* executed to the defendant *C. D.* a bond, in a penalty of £ , conditioned for the due performance by the plaintiff of the said agreement of the 29th of September, 1881.

2. The whole of the work done by the plaintiff, has, in order to render the premises fit for habitation, had to be pulled down or effaced at a considerable expense, and the defendant *C. D.* has been obliged to expend the sum of £ in completing the said repairs, being a sum far in excess of what they would have cost if the repairs had been properly carried on from their commencement.

The defendant *C. D.* claims:—

1. £ damages.

(No. 17c.)
Reply to
defence and
counterclaim.

1878. B. No. 2.

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

Between *A. B.*, Plaintiff,

and

C. D., Defendant

(by original action);

And between the said *C. D.*, Plaintiff,

and

the said *A. B.* and *E. F.*, Defendants

(by counterclaim.)

Reply.

The plaintiff joins issue with the defendant *C. D.* on his defence, and in reply to the counterclaim the plaintiff and the defendant *E. F.* say as follows:—

1. The plaintiff and the defendant *E. F.* deny that the plaintiff commenced or carried on the repairs in an improper or unworkmanlike manner or employed bad materials, or that he did not use due despatch in their completion, but only proceeded with their work at irregular intervals.

2. The plaintiff never made any default under the said agreement from the day of its date up to the 1st of January, 1878, but duly performed the said agreement in every particular, and the plaintiff and the defendant *E. F.* deny that under these circumstances the said agreement was or could be put an end to by the defendant *C. D.*

3. The plaintiff and the defendant *E. F.* deny that the whole or any part of the work done by the plaintiff had to be pulled down or effaced in order to render the premises fit for habitation, either at a considerable expense, or in fact; some small portion of the work done was as a fact effaced at a very trifling cost, but there was no necessity for this being done.

4. The plaintiff and the defendant *E. F.* do not admit that the plaintiff has been obliged to expend, or has in fact expended, the sum of £ , or any sum, in completing the said repairs.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

(No. 18.)
Confession of
defence.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

The plaintiff confesses the defence stated in the paragraph of the defendant's statement of defence (*or of the defendant's further statement of defence*).

To the witness named *X. Y.*

Take notice that if you do not appear to the within counterclaim of the within-named *C. D.*, within eight days from the service of this defence and counterclaim upon you, you will be liable to have judgment given against you in your absence.

(No 19.)
Notice for
indorsement
on counter-
claim against
plaintiff along
with other
persons.

Appearance to be entered at

P

Q

(No. 20.)
Notice by
defendant to
third party.

187 [*Here put the letter and number*].
Notice filed , 187

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

To Mr. *X. Y.*

Take notice that this action has been brought by the plaintiff against the defendant (as surety for *M. N.*), upon a bond conditioned for payment of £2000 and interest to the plaintiff.

The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him on the ground that you are (his co-surety under the said bond; or, also surety for the said *M. N.*, in respect of the said matter under another bond made by you in favour of the said plaintiff, dated the day of , A.D.).

Or, (to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1000 tons of coal.

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent).

And take notice that if you wish to dispute the plaintiff's claim in this action as against the defendant *C. D.*, you must cause an appearance to be entered for you within eight days after service of this notice.

In default of your so appearing you will be deemed to admit the validity of any judgment obtained against the defendant *C. D.*, and your own liability to contribute or indemnify to the extent herein claimed, which may be summarily

enforced against you pursuant to the Rules of the Supreme Court, 1883, Order 16, Part 6.

(Signed) *E. T.*

or, *X. Y.,*

Solicitor for the defendant *E. T.*

Appearance to be entered at

1874. B. No.

(No. 21.)
Interrogatories.

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

Between *A. B.*, Plaintiff,

and

C. D., *E. F.*, and *G. H.*, Defendants.

Interrogatories on behalf of the above-named (*plaintiff*, or *defendant C. D.*) for the examination of the above-named (*defendants E. F.* and *G. H.*, or *plaintiff*).

1. Did not, &c.

2. Has not, &c.

&c., &c., &c.

(*The defendant E. F. is required to answer the interrogatories numbered .*)

(*The defendant G. H. is required to answer the interrogatories numbered .*)

1874. B. No.

(No. 22.)
Answer to
interrogatories.

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

Between *A. B.*, Plaintiff,

and

C. D., *E. F.*, and *G. H.*, Defendants.

The answer of the above-named defendant *E. F.*, to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named *E. F.*, make oath and say as follows:

(No. 23.)
Affidavit as to
documents.

1874. B. No.

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

Between *A. B.*, Plaintiff,
and

C. D., Defendant.

I, the above-named defendant *C. D.*, make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit, set forth in the first and second parts of the schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. (*Here state upon what grounds the objection is made and verify the acts as far as may be.*)

4. I have had, but have not now, in my possession or power, the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on (*state when*).

6. That (*here state what has become of the last-mentioned documents, and in whose possession they now are*).

7. According to the best of my knowledge, information, and belief, I have not now and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, letter, receipt, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

A. B. v. C. D.

Take notice that the (*plaintiff or defendant*) requires you to produce for his inspection, the following documents referred to in your (*statement of claim or defence, or affidavit, dated the day of , A.D.*).

(*Describe documents required.*)

X. Y.,

Solicitor to the

To *Z.,*

Solicitor for

(No. 24.)
Notice to
produce
documents.

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

A. B. v. C. D.

Take notice that you can inspect the documents mentioned in your notice of the day of , A.D. (*except the deed numbered in that notice*), at [*insert place of inspection*] on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the (*plaintiff or defendant*) objects to give you inspection of the documents mentioned in your notice of the day of , A.D. , on the ground that (*state the ground*).

(No. 25.)
Notice to
inspect
documents.

In the High Court of Justice.

Chancery Division.

[*Name of Judge.*]

A. B. v. C. D.

Take notice that the plaintiff (*or defendant*) in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the

(No. 26.)
Notice to
admit
documents.

defendant (*or plaintiff*), his solicitor or agent, at ;
 on , between the hours of , and ; and the
 defendant (*or plaintiff*) is hereby required within forty-eight
 hours from the last-mentioned hour, to admit that such of
 the said documents as are specified to be originals were
 respectively written, signed, or executed as they purport
 respectively to have been ; that such as are specified as copies
 are true copies, and such documents as are stated to have
 been served, sent, or delivered, were so served, sent, or
 delivered respectively ; saving all just exceptions to the
 admissibility of all such documents as evidence in this
 cause.

Dated, &c.

To *E. F.*

Solicitor (*or agent*), for defendant (*or plaintiff*).

G. H.,

Solicitor (*or agent*) for plaintiff (*or defendant*).

(*Here describe the documents, the manner of doing which may
 be as follows :—*

ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between <i>A. B.</i> and <i>C. D.</i> first part, and <i>E. F.</i> second part	January 1, 1848.
Indenture of lease from <i>A. B.</i> to <i>C. D.</i>	February 1, 1848.
Indenture of lease between <i>A. B.</i> , <i>C. D.</i> first part, &c.	February 2, 1848.
Letter, defendant to plaintiff	March 1, 1848.
Policy of insurance on goods by ship " <i>Isabella</i> ," on voyage from Oporto to London	December 3, 1847.
Memorandum of agreement between <i>C. D.</i> , captain of said ship, and <i>E. F.</i>	January 1, 1848.
Bill of Exchange for £100 at three months, drawn by <i>A. B.</i> on and accepted by <i>C. D.</i> , endorsed by <i>E. F.</i> and <i>G. H.</i>	May 1, 1849.

COPIES.

Description of Documents.	Dates.	Original or Duplicate, served, sent, or delivered, when; how, and by whom.
Register of baptism of A. B., in the parish of X. Letter, plaintiff to de- fendant.	January 1, 1848. February 1, 1848.	Sent by General Post, February 2, 1848. Served March 2, 1848, on defendant's at- torney by E. F. of
Notice to produce papers .	March 1, 1848.	
Record of a judgment of the Court of Queen's Bench, in an action <i>F. S.</i> <i>v. F. N.</i>	Trinity Term, 10th Vict.	
Letters Patent of King Charles II. in the Rolls Chapel	January 1, 1680.	

[Heading as in Form 1.]

(No. 27.)

Take notice that the plaintiff [*or defendant*] in this cause requires the defendant [*or plaintiff*] to admit, for the purposes of this cause only, the several facts respectively hereunder specified; and the defendant [*or plaintiff*] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this cause.

Notice to
admit facts.

Dated, &c. .

G. D., solicitor [*or agent*] for the plaintiff [*or defendant*].
To E. F., solicitor [*or agent*] for the defendant [*or plaintiff*].

The facts, the admission of which is required, are—

1. That John Smith died on the 1st of January, 1870.
2. That he died intestate.
3. That James Smith was his only lawful son.
4. That Julius Smith died on the 1st of April, 1876.
5. That Julius Smith never was married.

(No. 28.)
Admission of
facts, pur-
suant to
notice.

[*Heading as in Form 1.*]

The defendant [*or plaintiff*] in this cause, for the purposes of this cause only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of such facts, or any of them, as evidence in this cause.

Provided that this admission is made for the purposes of this action only, and is not an admission to be used against the defendant [*or plaintiff*] on any other occasion, or by any one other than the plaintiff [*or defendant or party requiring the admission*].

Delivered, &c.

E. F., solicitor [*or agent*] for the defendant [*or plaintiff*].
To *G. H.*, solicitor [*or agent*] for the plaintiff [*or defendant*].

Facts admitted.	Qualifications or Limitations, if any, subject to which they are admitted.
1. That John Smith died on the 1st of January, 1870.	1.
2. That he died intestate.	2.
3. That James Smith was his lawful son.	3. But not that he was his only lawful son.
4. That Julius Smith died.	4. But not that he died on the 1st of April, 1876.
5. That Julius Smith never was married.	5.

(No. 29.) In the High Court of Justice.
Notice of trial. Chancery Division.

[*Name of Judge.*]

A. B. v. C. D.

Take notice of trial of this action (*or of the issues in this action ordered to be tried*) for the day of next.

X. Y.,

Plaintiff's solicitor (*or as the case may be*).

Dated,

To *Z.*,

Defendant's solicitor (*or as the case may be*).

1883. B. 1. (No. 30.)
Notice of
motion.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Take notice that the Court will be moved on the
day of 18 , at 10.30 o'clock in the forenoon,
or so soon thereafter as counsel can be heard by Mr.
of counsel for (*state relief asked*).

Dated the day of 18 .
To (Signed)

1881. B. 1. (No. 31.)
Summons.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

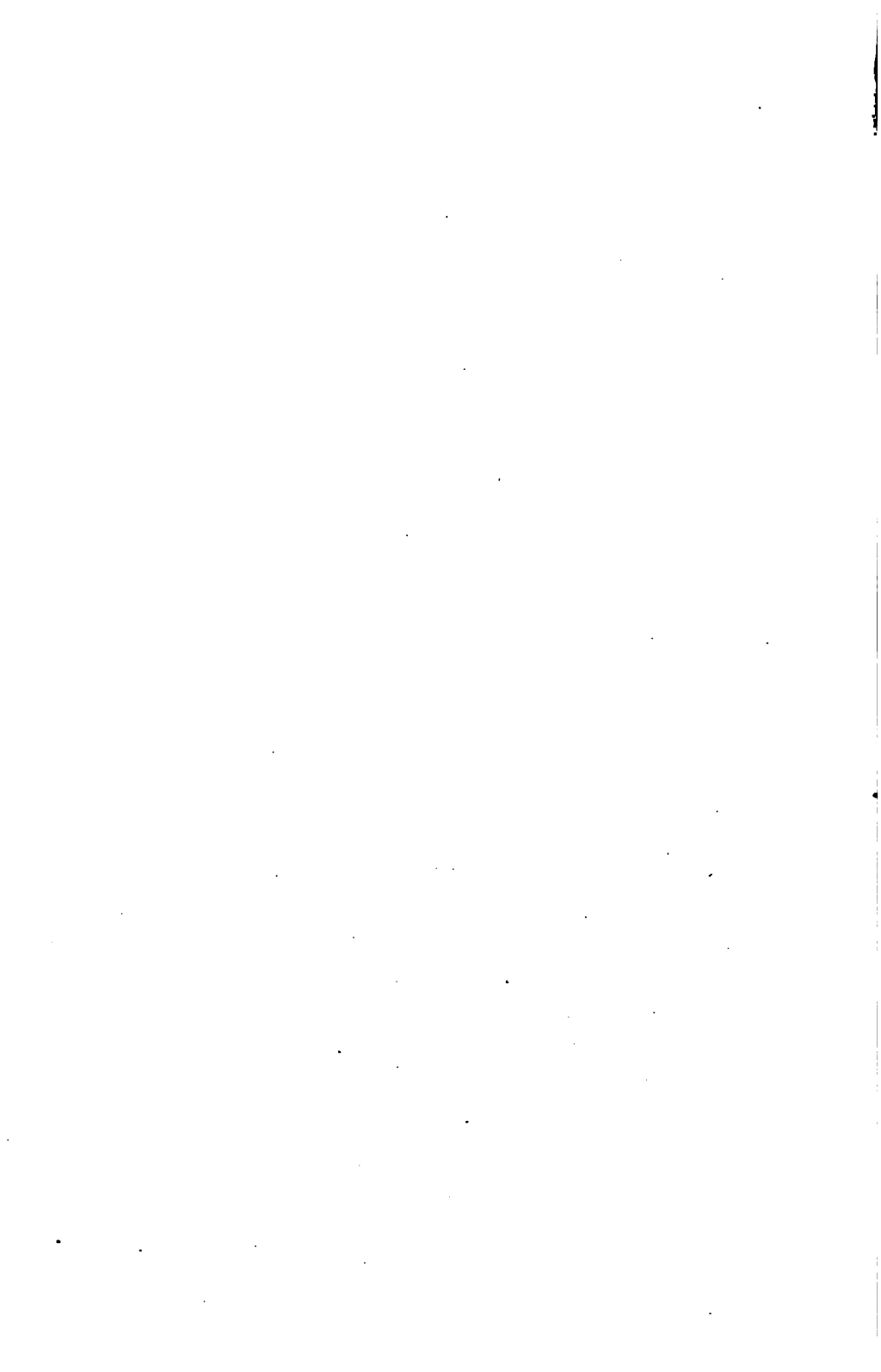
Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Let all parties concerned attend the Judge in Chambers, on
the day of 188 , at
o'clock in the noon, on the hearing of an applica-
tion on the part of (*state on whose behalf the application is
made*), that (*state the precise object of the application*).

Dated this day of 1881.
[*Name of Judge.*]

This summons was taken out by *A. B.*, of [*address*],
solicitors for the applicant.

To [*insert the names of the solicitors or persons to be served
with the summons.*]



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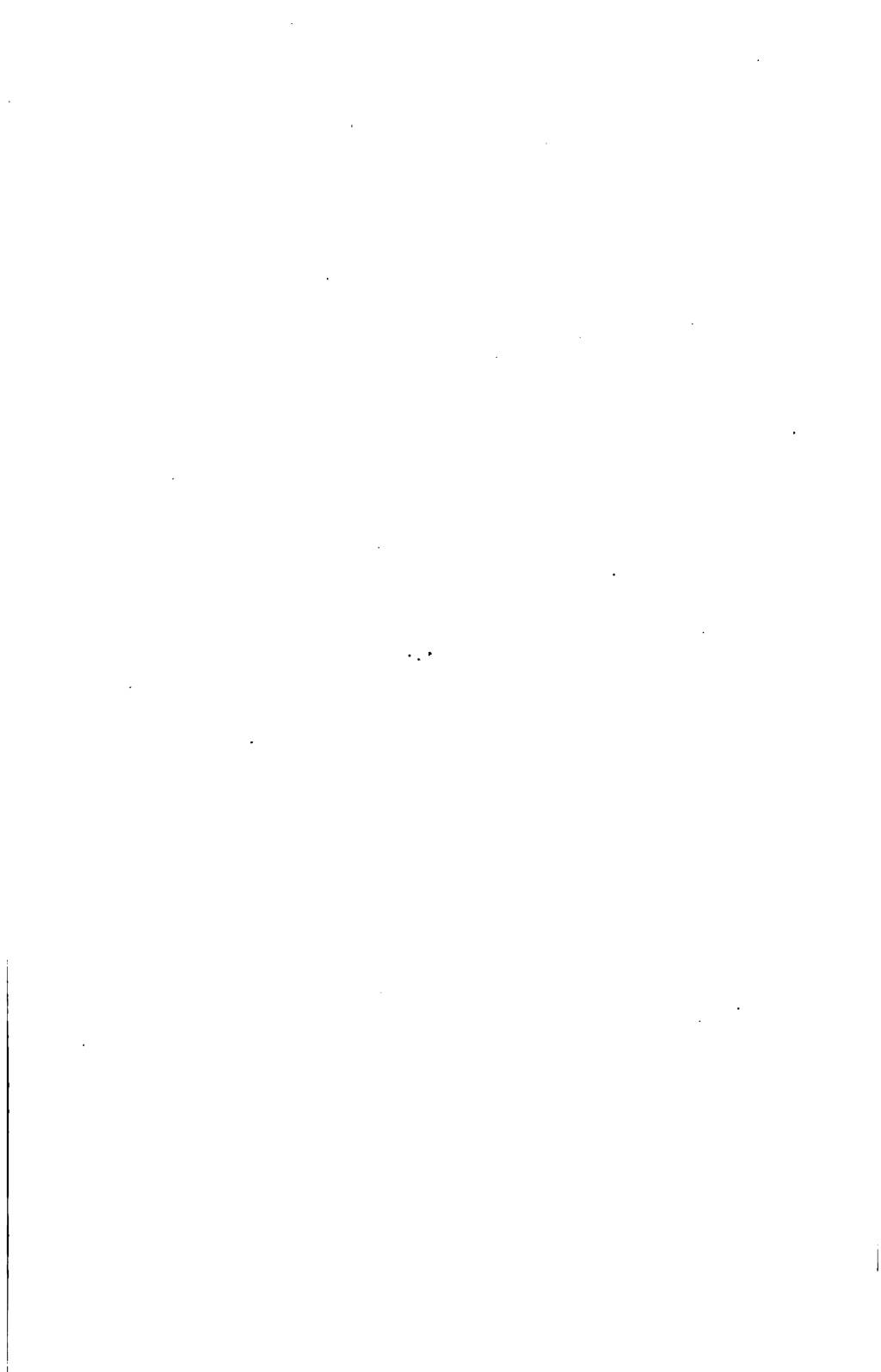
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